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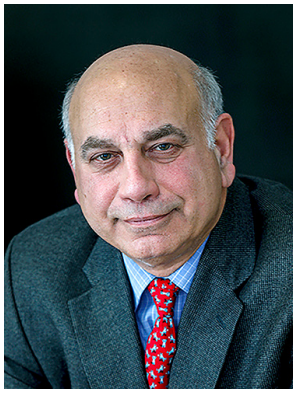
Horse-Shedding the Witness: When Does Witness Preparation Cross the Line?



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Horse-Shedding the Witness: When Is Witness Preparation Really Unethical Coaching?[1]

Witness preparation is, of course, an accepted practice in the United States. Attorneys are not only expected to prepare witnesses for trials and depositions, but it is their professional responsibility as advocates for their clients to do so. While witness preparation may be commonplace, attorneys must be careful not to cross the line separating acceptable witness preparation from improper witness "coaching." This article will explore two areas where the ethical boundaries surrounding this issue are often confronted: (1) witness preparation in advance of testifying and (2) coaching witnesses during depositions. While the focus of this article is on New York practice, the observations made should be generally applicable in most jurisdictions.

I. WITNESS PREPARATION IN ADVANCE OF TRIAL

A. General Considerations.

Witness preparation is a commonly accepted practice and an essential part of trial work in the American system of justice.[2] Attorneys often meet with witnesses before they give testimony to discuss with them what they should expect at an upcoming proceeding. The failure to prepare a witness can lead to amusing, and sometimes disastrous, results; the former illustrated by this reported exchange:

> Attorney: "Please don't shake your head. All your answers must be oral. Did you travel to London?"
>
> Witness: "Oral."

Edward Carter, Horse-shedding, Lecturing and Legal Ethics, p. 1 (2008).

The Restatement (Third) of the Law Governing Lawyers § 116 provides that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Furthermore, courts have acknowledged that "[i]t is usual and legitimate practice for ethical and diligent counsel to confer with a witness whom he is about to call prior to his giving testimony, whether the testimony is to be given [at] deposition or at trial." See Elkan Abramowitz & Barry A. Bohrer, "White-Collar Crime," NYLJ (May 2, 2006) (quoting Hamdi & Ibrahim Mango Co. v. Fire Ass'n, 20 F.R.D. 181, 182 (S.D.N.Y. 1957)); Pesch v. Boddington Lumber Co., 124 N.M. 666 (1998); North Carolina v. McCormick, 298 N.C. 788 (1979); see also Lisa Renee Salmi, Don't Walk The Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, 18 Rev. Litig. 135 (1995); D.C. Bar Ethics Opinion No. 79 ("[L]awyers commonly, and quite properly, prepare witnesses for testimony….").

Although there is no explicit affirmative duty to prepare a witness for trial, the failure to do so can constitute a breach of an attorney's professional responsibility as attorneys are required to "competently" represent their clients. See New York Rules of Professional Conduct ("NY Rules") 1.1(a) ("A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); ABA Model Rule of Professional Conduct ("ABA Model Rules"), Rule 1.3 ("[a] lawyer shall act with reasonable diligence and promptness in representing a client"); In re Stratosphere Corp. Securities Litigation, 182 F.R.D. 614, 620 (D. Nev. 1998) (observing that a lawyer has an "ethical duty to prepare a witness").

This representation of clients, however, must of course be "within the bounds of the law." Attorneys must be careful not to cross the line from permissible witness preparation to impermissible witness coaching by suggesting what testimony a witness should give. A widely quoted rule of thumb has been that "an attorney can instruct a witness how to testify, but should refrain from telling a witness what to say." Abramowitz & Bohrer, "White-Collar Crime," supra p. 2. As noted by the New York Court of Appeals:

> [An attorney's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.

In re Eldridge, 82 N.Y. 161, 171 (1880).

The Restatement (Third) of the Law Governing Lawyers § 116, Comment b broadly[3] provides that witness preparation may include:

> [D]iscussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.

However, Comment b also states that a lawyer may not "assist the witness to testify falsely as to a material fact."[4] It further notes that inducing a witness to testify falsely can be a crime, "either subordination of perjury or obstruction of justice, and is ground for professional discipline and other remedies." According to Comment b, assisting a witness

in testifying falsely "may also constitute fraud, warranting denial of the attorney-client privilege to client-lawyer communications relating to preparation of the witness."

In addition to the Restatement, several provisions in the NY Rules bear on a lawyer's ethical responsibility when preparing witnesses:

1. A lawyer may not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that a lawyer may discuss the legal consequences of any proposed course of conduct with a client. (NY Rule 1.2(d)).

2. A lawyer may not knowingly offer or use evidence that the lawyer knows to be false. (NY Rule 3.3(a)(3)).

3. A lawyer may not participate in the creation or preservation of evidence which she knows (or is obvious that it) is false, nor may a lawyer offer an inducement to a witness that is prohibited by law. (NY Rule 3.4(a)(5)).

4. It is professional misconduct for a lawyer to commit an illegal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer. (NY Rule 8.4(b)).

5. It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation. (NY Rule 8.4(c)).

6. It is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice. (NY Rule 8.4(d)).

Of these Rules, the most relevant are NY Rules 3.3(a), which provides that a lawyer may not offer or use false evidence, and 3.4(a)(5), which provides that a lawyer "may not participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." The NY Rules define "knowledge" to mean "actual knowledge of the fact in question." NY Rule 1.0(f). However, the definition also states that a person's knowledge may be inferred from the circumstances. Id. This definition suggests that a lawyer may be found to have "knowledge" when the lawyer actually knew or must have known that his preparation of a witness would assist the witness in testifying falsely. See Joan C. Rogers, "Witness Preparation Memos Raise Questions

About Ethical Limits," ABA/BNA Lawyers' Manual on Professional Conduct (Feb. 18, 1998).

Aside from undermining the judicial process itself, many concrete dangers are associated with improper witness preparation. See Brad Rudin, "The Ethical Boundaries of Witness Preparation," Criminal Law NYSBA CLE, Segment on Professional Responsibility (Spring 2007). First, improper witness preparation may subject an attorney to disciplinary charges. Id. Witness preparation may also undermine the witness's credibility if the trier of fact determines that his or her testimony was the product of a script prepared by an attorney. Id. If witness preparation appears to have a dishonest purpose, the witness may subject the attorney to the threat of disclosure, and the existence of this threat will undermine the attorney's ability to give legal advice which is unaffected by self-interest. Id. (citing former NY DR 5-101(A)). Although rare, criminal charges may also result from improper witness preparation. Id. (citing NY CLS Penal § 215.10 (2007) [a person is guilty of witness tampering when "knowing that a person is or is about to be called as a witness in an action or proceeding, he knowingly makes any false statement or practices any fraud or deceit with intent to affect the testimony of such person"]).

In the past 20 years there have been at least six widely publicized incidents involving "witness coaching." In 1997, a firm representing plaintiffs in an asbestos case inadvertently turned over to defense counsel a document entitled "Preparing for Your Deposition." This twenty page memo provided general information and advice about being deposed, instructed alleged asbestos victims how to deal with questions likely to be asked at their depositions, listed many health symptoms that could enhance damages, and

provided detailed information about asbestos products and packaging. Rogers, "Witness Preparation Memos Raise Questions About Ethical Limits," supra p.7. Some notable excerpts from the "witness preparation" memo given to the witnesses in advance of their deposition include:

> How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.
>
> Remember to say you saw the NAMES on the BAGS, BOXES, or PAILS.
>
> 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 say you saw more of one brand than another, or that one brand was more commonly used than another. Be CONFIDENT that you saw just as much of one brand as all the others.
>
> 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!

Id. Not only did revelation of this witness preparation memo result in attempts to dismiss claims brought by the law firm on behalf of its clients, it also led to disqualification motions and referrals to disciplinary authorities. See W. William Hodes, The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law, 30 Tex. Tech. L. Rev. 1343 (1999).

A number of commentators have argued that this memo violated the ethical rules prohibiting a lawyer from engaging in conduct involving dishonesty or fraud, assisting a witness to testify falsely, and assisting a client in conduct the lawyer knows is fraudulent,

especially to the extent the memo was not based on specific information previously provided by the clients, but rather was intended as a generic "script" for all clients. And for some, these concerns were only compounded by the memo's failure to expressly instruct clients to "testify truthfully." See generally Lester Brickman, On The Theory Class's Theories of Asbestos Litigation: Disconnect Between Scholarship and Reality?, 31 Pepperdine Law Review 33 (2004); Bradley Wendel, "Witness Coaching," Professional Responsibility: Examples and Explanations (Aspen Publishers, 2d ed. 2007).

But not all commentators have been so critical. Well-known legal ethicist William Hodes served as an expert witness in support of this law firm in the various cases where use of the Memo was challenged and has written extensively in support of the permissibility of "horseshedding" (within limits), including the provisions of this preparation memo. See Hodes, The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law, supra p.8.

A second well-broadcasted situation had its genesis in a letter disseminated by the EEOC in its sex discrimination class action suit against Mitsubishi Motor Manufacturing of America, Inc. The letter, addressed "Dear Class Member," was sent to sixty women notifying them of Mitsubishi's intentions to depose them. See Rogers, "Witness Preparation Memos Raise Questions About Ethical Limits," supra p.6. The letter informed the women that they may be entitled to money damages, contained a list of "memory joggers," and asked the women to "try to remember whether or not" they had observed or experienced certain activities. Id. This letter, like the earlier referenced asbestos witness preparation memo, did not expressly remind the women of their obligation to tell the truth. Id. The following are some excerpts from the letter:

> You are one of the women EEOC has identified as being possibly entitled to money damages and other relief.
>
> To help you to take advantage of this opportunity to get your experiences and point of view on the record, EEOC has developed a short list of "memory joggers" that we suggest that you begin thinking about. Consider each of them and try to remember whether or not you have experienced or observed such activities:
>
> SEXUAL CONDUCT
>
> **sexual jokes, unwanted nicknames or greetings
> **propositions, requests for sex, requests for dates
> **unwelcome touching, groping, brushing up against
> **circulation of pornographic photos, drawings
> **sexual graffiti, cartoons, signs, notes
> **other sexual conduct you thought was offensive
>
> HOSTILITY TOWARDS WOMEN
>
> **anti-women statements, such as "women don't belong in the plant," why aren't you home?" etc.
> **women getting less favorable rotations/assignments
> **women getting less training or cooperation or help
> **women being called names like "bitch" (or worse)

Id.

Mitsubishi argued that this letter was ethically improper as it suggested that the women tailor their testimony so as to receive a more favorable monetary award. Id. A federal judge, however, disagreed with this assessment, and ultimately denied Mitsubishi's request for sanctions. Id. The judge found that while suggestive, the letter did not go beyond the ethical boundaries of proper witness preparation. Id.

In the headlining death penalty sentencing trial of Zacarias Moussaoui, who pled guilty in April 2005 to conspiring with the 9/11 hijackers, a government aviation attorney was found to have crossed the line from permissible to impermissible witness preparation. See Shannon M. Awsumb, "Avoiding a Career-Ending Mistake: The Line Between Witness Preparation and Coaching," The Hennepin Lawyer (Feb. 20, 2007).

The lawyer disregarded a sequestration order, which prohibited non-victim witnesses from attending or otherwise following the trial proceedings before they were called to testify, by emailing trial transcripts to seven potential aviation witnesses containing portions of the opening statements of both sides regarding FAA evidence, as well as the lawyer's opinion on several issues in the case. Id. One email, for example, stated that "the aviation lawyers were 'stunned by the opening,' that it had 'created a credibility gap that the defense can drive a truck through,' and that as a result, the government 'MUST elicit' certain facts from the aviation witnesses." Id. (quoting an email from the lawyer dated Mar. 8, 2006, attached to a Letter from U.S. Attorney to the Hon. Leonie M. Brinkema, U.S. Dist. Court Judge, United States v. Zacarias Moussaoui, No. 01-455 (E.D. Va. Mar. 13, 2006)).

As a result of this improper witness contact, the court entered an order precluding the government from introducing aviation-related evidence, including testimony from the witnesses and exhibits. Id. Although the court decided upon reconsideration to allow the government to introduce aviation-related evidence from witnesses upon a showing that they were not tainted by their contact with the lawyer, the lawyer became the subject of an investigation by a Pennsylvania disciplinary board , federal prosecutors looked into filing criminal charges against her, and seven family members of the victims of 9/11 filed suit against her alleging that she illegally coached witnesses and otherwise attempted to alter evidence. Id.

The fourth, fifth and sixth examples are more recent. In March of 2014, an expert testified on behalf of Samsung in the celebrated smartphone patent litigation, Apple, Inc. v. Samsung Electronics Co, Ltd., Case No. 5:12-cv-00630 (N.D. Cal.). The case

involved each company accusing the other of multiple patent infringements. One of the Apple patents covers the "swipe-to-unlock" feature of the iPhone, and another the "quick link feature." During the trial of another infringement case, Apple v. Motorola, Judge Posner, sitting by designation on the District Court for the District of Northern Illinois, provided a specific claim construction of this quick links patent that was apparently different than that advanced in the Samsung litigation. As a result of a ruling by the U.S. Court of Appeals for the Federal Circuit, the "Posner construction" made its way into the Samsung litigation. In subsequent testimony by a Samsung expert, rather than offer an alternative view of the case based on the Posner construction, the expert testified, "I have been using this [Judge Posner's] construction since the first day I worked on this case." One individual reportedly described a "visibly angry" Judge Koh as saying:

> [I]n his report, he does not adopt Posner's construction and then he gets up on the stand and says he adopted it from day one. I'm going to strike what he said. I think he was primed to say that and that's improper. (Emphasis added).

See Ryan H. Flax, "Walking the Line: Don't Coach Your Experts (Re: Apple v. Samsung)" The Litigation Consulting Report, April 29, 2014; Law 360, Beth Winegarner "Quinn Slammed for Witness Coaching By Apple-Samsung Judge," Law360 (April 28, 2014); Erin Coe, "4 Tips for Prepping a Witness Without Crossing the Line," Law 360 (May 7, 2014).

The jury returned a verdict against Samsung, in favor of Apple, for $119.6 million. The final chapter on the stricken expert testimony and whether Judge Koh's ruling was warranted has probably not been written.

The fifth case is a trial court decision in Security National Bank of Sioux City, Iowa v. Abbott Laboratories, 299 F.R.D. 595 (N. D. Ia. 2014). [5] In this lengthy opinion,

discussed in more detail infra, the Court analyzed at great length deposition conduct consisting of a misuse of "form" objections, witness coaching and excessive interruptions. The Court's sanction for inappropriate conduct was to require the offending lawyer to write and produce a video for distribution within her firm on appropriate deposition conduct.

The sixth case is an Appellate Division case involving an investigation by the Departmental Disciplinary Committee for the First Judicial Department. In re Meltzer, 136 A.D.3d 14 (1st Dep't 2015). The disciplinary investigation involved, among other things, witness preparation of a client's friend, who testified in a criminal trial. During the preparation, some six to eight months before the trial, the attorney's instruction to his client's friend was to "'downplay' the number of times he met with [the attorney] to prepare for the trial in the event that he was asked such a question on cross-examination…the friend testified that he and [the attorney] met a total of three times to discuss his testimony. In fact they met a total of five to six times… he instructed the friend to 'downplay' the number of times they met so that it did not appear to the jury that they had rehearsed the 'perfect story'." Id. at 15-16.

The decision highlighted three separate transgressions: suborning perjury, failing to correct false testimony and making a false statement to the court and counsel. This witness preparation in a DWI case, ended the twenty-five year career of a New York attorney. Id.

More so than with many ethical issues, trying to delineate the parameters of permissible conduct in the context of witness preparation is extremely difficult, except of course at the outer limits where that conduct amounts to the knowing creation and/or use

of perjured testimony. This difficulty arises in part because there is limited authority to guide lawyers (largely due both to the inadequacy of the rules as written and to the "privileged" nature of many client/witness preparation, which often keeps this issue under wraps[6]). But also in part due to the tension created by a lawyer's obligation to fully and zealously represent his client (a tension that admittedly exists in many ethical contexts). The following anecdote reported by Professor Hodes illustrates the divergence of views when lawyers are confronted with this tension:

> At law school orientation one year, when I was visiting at Southern Illinois University School of Law, a retired judge told the entering students that legal ethics is easy. "You simply find the line between what is permitted and what is not," he said," and stay far, far to the good side of that line. I completely disagree, as I told my first year Professional Responsibility students in our first hour alone together.
>
> Legal ethics is hard. You must try to find the line between what is permitted and what is not, and then get as close to that line as you can without crossing over to the bad side. Anything less is less than zealous representation – which already leaves you on the bad side of the line. Whatever distance is left to travel up to that illusive line is territory that belongs to the client and has been wrongfully ceded away.

Hodes, The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law, supra p. 8. In the end, whether conduct is appropriate may most often come down to a question of "intent": are the lawyer's various preparation techniques intended (subjectively and objectively) to ensure that a witness communicates all appropriate evidence truthfully and in the most compelling manner or are they intended to have the witness tell the story the lawyer would like to have told? As two commentators have noted:

> Coaching, like many other tactics and conduct in litigation settings, is not and perhaps cannot be fully addressed in the

> codes. That arises in part because professional code drafters cannot conceive of and address all issues and in part because the propriety of even identical conduct may vary from case to case. The consequence of that reality is that lawyers cannot rely fully on the terms of the codes in resolving ethical issues that arise. Deciding how to conduct "trial work within ethical boundaries established by court rules, ethical codes, and other statutes" is the early part of the litigator's job. The hard part is remembering that identifying ethical practice goes far beyond that task." (Footnotes omitted.)

Fred C. Zacharias and Shaun Martin, Coaching Witnesses, 87 Ky. L.J. 1001, 1016-17 (1998/1999).

B. Understanding Human Psychology as Part of Ethical Witness Preparation.

In his seminal article, The Ethics of Witness Coaching, 17 Cardozo L. Rev. 1 (1995), Professor Richard Wydick of the University of California divided witness coaching (which he defined as "conduct by a lawyer that alters a witness's story about the events in question) into three categories or "grades." Grade I coaching involves a lawyer knowingly and overtly inducing a witness to testify to something the lawyer knows is false. This conduct, obviously, is both ethically and morally improper. Professor Wydick offers the following illustration:

> [S]uppose that lawyer L represents plaintiff P in a tort suit against defendant D… [I]t is important …to know how far apart P and D were standing at the time in question. If the distance was 100 yards or less, that will help P's case, but if it was more than 100 yards that will help D's case. …L knows that the distance was about 150 yards…[T]he following conversation takes place the first time L interviews eyewitness W, who is P's best friend….
>
> Q At the time in question, you were standing where you could see both P and D?
>
> A Yes.

> Q Let me be frank. In this lawsuit it would be very helpful to P if the distance between P and D were less than 100 yards. Could you help us out on that?
>
> A Oh, I'm quite sure it was less than 100 yards.

This is Grade I because L's inducement to W to provide false evidence is overt. Id. at 20-21.

Grade II coaching is similar to Grade I, except that the lawyer acts covertly rather than overtly. In other words, the conduct is masked so that the person being led to a false end does not realize it is happening. Professor Wydick illustrates Grade II coaching as follows:

> [S]uppose that plaintiff P has sued defendant D Company … on some civil claim, the nature of which need not concern us. One of the issues…involves a certain meeting between representatives of P and D Company. P asserts that at the meeting, Ms. E (a high-ranking executive of D…) made statements X, Y and Z. If Ms. E did make any one or all of those statements, it will benefit P's case and harm D Company's defense.
>
> Two representatives of P were present at the meeting. D Company was represented by Ms. E, who took along her assistants Mr. A and Ms. B. Nobody else was present… Suppose that lawyer L is interviewing Mr. A for the first time to find out what he remembers about the meeting. Suppose, further, that L does not know what was said at the meeting. L would, of course, like to develop evidence that Ms. E did not say X, Y or Z at the meeting. Suppose that the critical part of the interview goes like this:
>
> Q At the meeting did Ms. E say X?
>
> A No, I am quite certain she didn't.
>
> Q Did she say Y at the meeting?
>
> A Again, I am quite certain that she did not.
>
> Q At the meeting, did Ms. E say Z?

A Well, you know, as to Z, yes, I think she may very well have said Z.

Q O.K. now, I need to make sure that I understand correctly what you are telling me. You are absolutely certain the E did not say X, is that right?

A Yes, that's right.

Q And you are absolutely certain that E did not say Y, is that right?

A Yes, that's right.

Q And as to Z, you say "I think," but you aren't certain? Am I correct in believing that you simply do not know one way or the other as to Z?

A Yea, I guess that's right.

Q So you remember for certain that she did not say X, and you remember for certain that she did not say Y, but you do not remember one way or the other about Z, is that right?

A Right.

Id. at 34.

The "success" of this method of coaching relies on Grice's Theory of Conversational Implicature. Professor Paul Grice posited this theory in 1967 based on the premise that "what a speaker says is often different from the message the speaker wants to send the hearer." Id. at 28. Grice called this intended meaning the speaker's implicature. Sometimes the implicature is the same as the speaker's words, but often it is not. Grice observed that a conversation is not ordinarily a series of disjointed statements but reflects a "cooperative endeavor, with a common purpose or direction," which he called the Cooperative Principle.

This Principle is built on four maxims: quantity, quality, relation and manner. Quantity refers to making one's contribution to a conversation as informative as is

required by the context – not saying too little or too much. Quality refers to not saying something that the speaker believes is false or for which there is a lack of evidence. Relation means making your contribution to the conversation relevant. Manner refers to avoiding obscurity in your expression, avoiding ambiguity, being brief and being orderly. According to Grice, there is an implied covenant to follow the maxims. But, there are times when the covenant is breached. For example, if something false is said to deceive, the maxim of quality is violated. When a speaker blatantly breaks one of these maxims, making the violation obvious to the hearer, "the speaker's purpose is to raise a conversational implicature and thus to send an unstated message to the hearer." Id. As an example, Professor Wydick describes a statement from a wife as her husband is leaving the house, looking out the window and saying, "It is raining." Her implicature may be just what she said: "it's raining." Id. at 30. If, however, the husband is leaving the house for the day, her implicature may be advice that her husband "take an umbrella." Id. If, however, the husband bids a fond farewell before departing, a response of "it is raining," flouts the maxim of relevance -- the husband expected a response pertaining to fondness, departure or both. Id at 31. Her response, not responsive and therefore irrelevant on its face, is a warning that he must interpret as relevant. Therefore, her unstated message is, "Take your umbrella, dear, so you won't get wet and catch cold." That is conversational implicature. Id.

In the above illustration of Grade II coaching, L is breaking the first maxim of quality in that he is blatantly making a statement he knows is false (in that it distorts what Mr. A originally said). With that distortion comes a covert signal that Mr. A might be

better off saying something else. Like Grade I coaching, Grade II coaching is unethical and morally wrong.

Grade III coaching is where the lawyer does not knowingly induce the witness to testify falsely, but the lawyer's conversation with the witness alters the witness's story. This form of coaching lacks any "intent" and therefore may not subject a lawyer to discipline, but it is nonetheless important for a lawyer to understand how interaction with a witness can affect testimony, even unintentionally.

To assist lawyers in analyzing the propriety of their questions/statements in witness preparation, Professor Wydick offers four "steps":

> Step One: Will my next question or statement overtly tell this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then –
>
> Step Two: Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then –
>
> Step Three: Is there a legitimate reason for my next question or statement to this witness? If there is no legitimate reason, then I should not ask the question or make the statement. If there is a legitimate reason, then –
>
> Step Four: Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness's testimony? If not, then I should change my approach.

Id. at 39-40.

Professor Wydick's article concludes with a number of non-suggestive interviewing techniques that are well worth consideration, but beyond the scope of this article. Among the techniques he discusses are: use of recall first, then recognition questioning[7]; use of neutral questions; and attention to the ordering of questions. He also

offers suggestions for using a "cognitive interview" style that is more directed at learning from the witness, rather than coaching the witness.

More recent commentators are critical of Professor Wydick's analysis on a number of fronts ,findings only his Grade I analysis "accurate as it stands." Stephen M. Goldman and Douglas Winegardner, in The Anti-False Testimony Principle and The Fundamentals of Ethical Preparation of Deposition Witnesses, 59 Catholic University Law Review, 1, 33 (2009). They criticize his Grade II analysis because it omits the situation where a lawyer "by stealth, indirection or some other form of deception – attempts to induce a witness (1) to doubt a previous memory and substitute one more favorable to the case or (2) to adopt a belief about which he was initially unsure as a clear memory." Id. at 34. In other words, the lawyer subtly tricks the witness into the desired testimony instead of asking the witness to partake; albeit by implication. In this scenario, the witness is an unknowing participant, but the lawyer's conduct should still be seen as crossing the line. The authors are also critical of Professor Wydick's conclusion that Grade III coaching is not a basis for attorney discipline because while the lawyer's conduct alters the witnesses story, the lawyer does not "know" that the altercation is false. Goldman and Winegardner argue that in a Grade III scenario, it is not enough that the lawyer simply not "know" the resulting alteration is false to avoid discipline; the lawyer acts ethically only if he or she reasonably (and affirmatively) believes the altercation is true. Id. at 37.

C. **Specific Preparation Issues.**

This section discusses several specific, recurring witness preparation issues confronted by attorneys.

1. Instructing a Witness About the Law Before Learning the Facts.

A common issue for lawyers is whether to advise a client (or other witness) of the applicable law before hearing the client's (or witness') version of the facts. See John S. Applegate, Witness Preparation, 68 Tex. L. Rev. 277, 300-304 (1989); Deborah L. Rhode, Professional Responsibility: Ethics By The Pervasive Method 197-99 (2d ed. 1998). Under NY Rule 3.4 (b), a lawyer must not "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." Similarly, under the ABA Model Rules of Professional Conduct, a lawyer must not "counsel or assist a witness to testify falsely." ABA Model Rule 3.4(b). However, lawyers are permitted to interview witnesses prior to their testifying, and in preparing a witness to testify, a lawyer may discuss "the applicability of law to the events in issue." Restatement (Third) of the Law Governing Lawyers § 116 cmt.b (2000); North Carolina v. McCormick, 298 N.C. 788 (1979). The obvious concern in leading with the legal "lecture" is that doing so may induce a client/witness to alter testimony to fit "legal needs" rather than to only tell the truth. On a less sinister level than outright fabrication, the lecture might simply subconsciously alter a witness' perception and recollection. Salmi, Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, supra p. 2, at 154.

The Nassau County Bar Association, Committee on Professional Ethics has specifically addressed this issue in Opinion No. 94-6 (1994). It considered the following scenario:

> A client consults with inquiring counsel about an automobile accident the client was involved in. Prior to discussing the case further inquiring counsel explains what is necessary to be successful on a claim as follows:
>
> Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.
>
> Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping – you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

The Committee noted that whether this interview approach was appropriate presented a difficult question. On the one hand, the Committee recognized that by educating the client before being given a full recitation of the facts, the attorney may be allowing the client to tailor his story to fit the legal standards. On the other hand, to mandate keeping the client ignorant of the law until he has given a recitation of the facts could be viewed as "legislating" a mistrust of the client's honesty. The Committee ultimately determined that as long as the attorney in good faith did not believe that he or she was participating in the creation of false evidence, the conduct did not violate the New York Code of Professional Responsibility.

This scenario presents perhaps the classic illustration of the importance of "intent." Clearly making sure a witness – especially a client who has a direct interest at stake – understands the legal requirements to prevail so that he can better understand the context of his testimony and is better positioned to tell his lawyer, truthfully, about facts which he might not otherwise appreciate as significant, is permissible. Lecturing a witness/client on the law before learning what he has to say, for the purpose of allowing – even inducing – him to conform his testimony, and create helpful "recollections" accordingly, is not. Generally, the most prudent course of action – to avoid even an appearance of impropriety – is to "save the lecture" until after the lawyer has learned the basics of the witness' testimony so that it is better used as a true "memory jogger" rather than a "memory creator." Professor Wydick, along with several other commentators, reference the "lecture" scene from Anatomy of a Murder by Robert Traver, 35-49 (1958), as perhaps the best example of using the "lecture" to cross the line in witness preparation.[8]

Anatomy of a Murder is a story of a criminal defense attorney, Biegler, and his client, Army Lieutenant Manion. Manion, in front of several witnesses, shoots a man who raped Manion's wife. The lawyer is worried that in preparing his client, "a few wrong answers to a few right questions" will leave the lawyer with a client "… whose cause was legally defenseless." Id. at 32. As a result, the lawyer lectures his client on the law of murder and possible defenses. He explains the law in a way that makes his client understand his only hope is a type of insanity. The self-interest light bulb goes on and the client then describes his mental condition so as to fit within the definition his lawyer just

explained in detail. In case the reader missed what just happened in the story, the jurist-author explains:

> The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical … Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"

Id. at 35.

2. Altering the Witness' Words.

Lawyers, more than most people, understand the importance of words, especially the "right words." As Mark Twain wrote, "the difference between the almost right word and the right word … [is] the difference between the lightning bug and the lightning." Letter from Mark Twain to George Bainton (October 15, 1888), www.twainquotes.com. In the course of preparing witnesses to testify, lawyers often – sometimes at their own initiation and sometimes at the request of the witness – suggest ways to better communicate the substance of the testimony the witness is to deliver, including the suggestion of specific wording. This issue was addressed in DC Bar Ethics Opinion No. 79:

> [T]he fact that the particular words in which testimony…is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would

> be equally impermissible from the ethical point of view. Herein, indeed, lies the principal hazard…in a lawyer's suggesting particular forms of language to a witness instead of leaving the witness to articulate his or her thought wholly without prompting: there may be differences in nuance among variant phrasings of the same substantive point, which are so significant as to make one version misleading while another is not. Yet it is obvious that by the same token, choice of words may also improve the clarity and precision of a statement: even subtle changes of shading may as readily improve testimony as impair it. The fact that a lawyer suggests particular language to a witness means only that the lawyer may be affecting the testimony as respects its clarity and accuracy; and not necessarily that the effect is to impair rather than improve the testimony in these respects. It is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, whether truth shades into untruth, and to refrain from crossing it.

See also Hodes, The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law, supra p. 8, at 1363 (suggesting that so long as the lawyer's actions do not result in the presentation of false testimony, it is permissible to "enhance the effectiveness of the witness's communication…."; similarly counseling witness to avoid slang or derogatory terms is permissible); Harold K. Gordon, "Crossing the Line On Witness Coaching," NYLJ (July 8, 2005) ("permissible would be a suggestion that a witness eliminate slang or colloquial terms from his responses…as long as some independent evidentiary significance will not be lost by doing so."); Restatement (Third) of the Law Governing Lawyers, §116, Comment b ("A lawyer may suggest choice of words that might be employed to make the witness's meaning clear."). We all remember, for example, James Mason preparing the anesthesiologist to testify in the movie The Verdict. When asked what caused his patient to lose oxygen, he first says, "She'd aspirated vomitus into her mask." In response, Mason says, "Cut the bullshit, please. Just say it. She threw up in her mask" and the doctor then repeats that phrase verbatim.

But, of course, even this conduct can go "too far." For example, influencing a witness in an automobile accident case to change her unfiltered statement about a "recklessly speeding car" which was involved in a "thunderous crash" to one about a "car traveling down the road and hit a parked vehicle" may go too far. While the "revised" statement may be accurate, the changes have affected the substance of the testimony. See Gordon, "Crossing the Line on Witness Coaching," supra p. 26 ("a lawyer treads on thin ethical ice when he suggests a choice of words that may alter the substance or intended meaning of the witness' testimony. For instance, encouraging a witness to testify that he had a 'conversation' with the defendant rather than the 'screaming match' that actually took place on the phone or that he simply 'hit' a party instead of 'beating' them would result in false or misleading testimony."); Richard Alcorn, "Aren't You Really Telling Me…? Ethics and Preparing Witness Testimony," Arizona Attorney (March 2008) ("If … preparation is intended to modify only the manner in which testimony is presented and not to change its content, the preparation should be viewed as ethical. Attempting to eliminate potentially offensive witness mannerisms, or to eliminate the witness's use of 'powerless' speech phrases such as 'you know,' 'I guess,' 'um,' 'well,' or the like, should pass ethical muster. Contrast this with the lawyer who 'reshapes' the witness's testimony by suggesting specific substantive words or answers for responses to anticipated examination."); but see Haworth v. State, 840 P. 2d 912 (Wyo. 1992) (prosecutor restricted in his ability to question a criminal defendant about defense counsel's suggestion in preparation for testifying that he use the word "cut" instead of "stab" to describe the incident; court noted the de minimis effect of such word differences on the proceeding where other testimony described the incident).

In Ibarra v. Harris County Texas, 338 Fed. Appx. 457 (5th Cir. 2009) the Court considered the impact of a trial consultant's introduction of "new language" into the testimony of witnesses. In this case, which involved a §1983 action against a Texas county and several law enforcement officers, an expert consultant had prepared a report justifying the conduct of the officers, in part, based upon the fact that the events in question had taken place in what the consultant described as a "high crime area" and that the officers' conduct could be justified because of concern over "retaliation." Both of those terms became linchpins of the defense theme, yet neither were ever mentioned in the officers' pretrial statements. Their trial testimony, which followed meetings with the consultant, referred repeatedly to these specific concepts.

In reviewing claims of improper witness coaching by defense counsel (since the consultant operated generally under the direction of and in conjunction with defense counsel), the Fifth Circuit noted that "[a]n attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way." 338 Fed. Appx. 467 (citation omitted). The plaintiffs in the 1983 case argued that these "terms of art" as additive of prior testimony reflected a conspiracy between the defendants and the consultant. The Court, not surprisingly, noted that "the appearance of these terms in the litigation would not be noteworthy if they merely repackaged the witnesses' prior testimony, neither adding nor subtracting anything substantive." But it ultimately accepted the District Court's conclusion that this was an impermissible alteration of testimony in order to substantively conform the witness' testimony to the defense's novel theories of the case.

The result was that the Fifth Circuit upheld misconduct findings and sanctions against the defense counsel involved.

In many situations, whether the suggested language change goes too far may depend on context and materiality. Where the language relates to something legally immaterial, but which nonetheless might be prejudicial to the jury, suggested alterations are likely to be more acceptable. On the other hand, where the testimony goes to the core issue, altering the witness's more emotional description may actually impact the substance of the testimony, thereby rendering it false, and go too far. See Joseph D. Piorkowski, Jr., Professional Conduct and The Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching, 1 Georgetown Journal of Legal Ethics, 389 (1987).

3. Changing the Witness's Appearance, Demeanor and/or Confidence.

Most commentators seem to agree that influencing the witness's appearance and/or demeanor, to make a more presentable/likeable (credible) witness is permissible. See, e.g., "Direct Examination," Modern Trial Advocacy 76 (National Institute for Trial Advocacy); see also Maryland v. Earp, 319 Md. 156. Similarly, preparation – or practice – for the purpose of making the witness more comfortable and credible seems to fall within the scope of permissible preparation. Gordon, "Crossing the Line On Witness Coaching," supra p. 26; Salmi, Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Depositions and Trial, supra p. 2; D.C. Bar Ethics Opinion No. 79; North Carolina v. McCormick, 298 N.C. 788 (1979).

But at the extremes, "influence" in this context can be problematic. There is, of course, a natural disincentive to "tweaking" a witness's appearance/demeanor too much,

in that it may become an easy target on cross-examination (or for rebuttal witnesses who "know" what the witness looks and sounds like in the "real world") and actually serve to undermine the witness's credibility. And, of course, going too far can simply amount to perpetrating a fraud on the court. Thus no one would think that a lay witness could take the witness stand in clergy garb. Similarly, urging a non-Christian to wear a visible cross while testifying before what is believed to be an all Christian jury may also go too far. See "Direct Examination," Modern Trial Advocacy, supra p. 28, at 76.

In Professional Conduct and The Preparation of Witnesses for Trial, supra p. 29, the author writes of the communicative nature of demeanor and places it within one of three categories: (1) behavior not intended to be communicative (for example involuntary or spontaneous conduct such as a yawn), (2) behavior intended to communicate a general message (for example, the use of polite mannerisms or wearing a suit, intended to convey the notion of an upstanding credible citizen) and (3) behavior intended to convey a specific message (such as expressing surprise at something). The author suggests that conduct in the first category is not intended to be communicative and, by definition cannot be falsified. He also suggests that demeanor in terms of the second category is too general to be capable of being falsified or misrepresented, although it seems, in the extreme (clergy garb or wearing a cross), it could be. The third category is of course the most subject to creating misrepresentation. Thus for example a witness feigned surprise at a known fact or an insincere emotional reaction could be tantamount to an explicitly false statement.

More problematic, because of its easy potential to substantively alter the meaning of testimony, and the difficulty in countering it through cross-examination, is instilling a

witness with "confidence" if false or taken to the extreme. While no one would quarrel with preparation and practice (even repeated) to make a witness more comfortable and to overcome the natural jitters of testifying, blindly instructing a witness of the need to be "confident" in her testimony can cross the line where the implicit meaning – or foreseeable outcome – is that the witness should come across as "firmly" recollecting that which in fact she is unsure of. Thus as one commentator has observed, "[o]ne can easily envision situations…where insisting that a witness answer .. with the tone and appearance of complete confidence will improperly mask the witness' real belief, which is that their recollection of a particular phone call or meeting is hazy at best, or that they were not fully comfortable with a decision they made…." Gordon, "Crossing the Line on Witness Coaching," supra p. 26.

4. Creating Memory and/or Creating Inducements to False Testimony.

The discussion above regarding the witness preparation Memo and the EEOC/ Mitsubishi letter illustrate the problems created by not relying on the witness to provide you with their testimony initially but rather "setting the stage" for the witness first. These issues are akin to the "lecture" problem except instead of leading with the "law," the lawyer is effectively leading with "desired facts" (or at least strong suggestions as to what those facts should be). In both the Memo and Mitsubishi cases, there were no final determinations of wrongdoing. Nonetheless, their substance is troubling. And it is particularly troubling if that information was first provided to the witness before discussions with counsel. Many of the matters raised in those documents might well have been proper for counsel to investigate with a witness after first hearing what they had to say on their own, but when performed in the fashion it appears it was completed, it

smacks of an attorney introducing themselves to a witness with: "Here are the five things I need you to say to have a perfect case. How many of them can I get you to say?" Such a method raises serious questions about the reliability of the responses. Indeed, the same outcome is possible through the inappropriate use of leading questions to guide a witness in the development of his or her recollection. See Bennett L. Gershman, Witness Coaching By Prosecutors, 23 Cardozo Law Review, 831, 842-43 (2002) ("For example, asking a witness whether he saw 'a car' is much less suggestive than asking the witness whether he saw 'the' car. Similarly asking the witness whether a person 'smacked' another's face may produce a decidedly different response than asking the witness whether a person 'hit' the other person." (Footnotes omitted).

5. Simultaneous Preparation of Multiple Witnesses/Using Other Sources to Refresh Recollection.

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses. See, generally, Alcorn, "Aren't You Really Telling Me…?" Ethics and Preparing Witness Testimony, supra p. 26; Carter, Horse-shedding, Lecturing and Legal Ethics supra p. 2; see also Prasad v. Bloomfield Health Servs., Inc., 2004 U.S. Dist. LEXIS 9289 (S.D.N.Y. 2004). One court, the Sixth Circuit, in United States v. Ebens, 800 F.2d at 1430-31, focused on whether information concerning the joint meeting could be a subject of cross-examination. Interestingly, there was a recording of the group meeting and one witness was persuaded in the joint session that he had heard racial slurs despite denying it earlier. Although there is no per se violation against group preparation, the process can be fraught with problems. First, if done with the intent that one of the witnesses "learn" the correct testimony to provide, it will constitute the Grade II coaching described by Professor Wydick. But even if done with

the best of intentions, it creates multiple problems (e.g., creating the appearance of collusion if it comes out at trial; weakening the value of each witness's testimony; creating false recollections and perceptions (even if unintentionally)) that often can outweigh the expediency and efficiency this approach offers. Id.

It is less problematic to use external sources – documents, another witness's recollection/version – to assist a witness in preparing for testifying when it is done after the witness has first exhausted their own, unassisted recollection. In the end, at least the D.C. Bar seems to be of a mind that "the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to." If so, the fact that the particular point of substance was initially suggested by someone else is without significance. See D.C. Bar Formal Opinion 79; see also Campbell, Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand, 36 Hofstra Law Review 265, 271 (2008).

6. Only Answer the Question Asked/"I Don't Recall".

All lawyers have instructed witnesses, in one manner or another, to answer "only" the question asked and if they do not really truly recall something, to say so. But this advice needs to be provided in a more complete context. For example, while the general proscription against volunteering information not asked for is appropriate, witnesses should understand that "half an answer" (even if literally due to having been asked only "half a question") which leaves a false or misleading impression is inappropriate. Hudson and Mhairtin, Preparing Your Client for Deposition or Trial Testimony, FDCC Quarterly 63 (Fall 2998); Campbell, Ethical Concerns in Grooming the Criminal Defendant for the Witness Stand, supra p. 32, at 271-72 (where witness's intoxication is an issue,

inappropriate for lawyer to advise client to testify that he only had "two drinks" if he in fact had "two doubles."). So too can counseling a witness that "any memory less than a vivid one is no memory at all" (so that questions are untruthfully met with "I don't recall") constitute inappropriately influencing the substance of a witness' testimony. Salmi, Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial, supra p. 2, at 162.

7. Repeated Rehearsals.

It is common to hold multiple "rehearsal" or role playing sessions with a witness, to go over expected direct and cross examination. Like most witness preparation techniques, there is nothing inherently improper in this conduct. D.C. Formal Bar Opinion 79; Restatement (Third) of the Law Governing Lawyers, § 116, Convent b. Also like most preparation techniques, this practice can go too far, both practically and ethically. Some level of preparation allows a witness to feel comfortable and testify confidently in a focused manner. On the practical side, too much preparation can create the appearance of a witness who is too "slick" for his own good. It can also lead to a witness being very comfortable with the material covered in the preparation but completely at a loss to respond to any "twists" that often come up in the course of testifying, thereby undermining that portion of their testimony that initially appeared to go "well." The ethical concern is that repeated rehearsals can improperly affect both the substance of the witness' testimony and the conviction with which the witness presents it (despite internal doubts about the accuracy of what they have to say), leading to the creation of false evidence.

> If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it

> is ethically unobjectionable. If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.

Wydick, The Ethics of Witness Coaching, supra p. 15, at 16.

8. Obstructing Access to a Witness.

The flip side of the witness preparation coin is whether an attorney may request a non-client witness to refrain from engaging in ex parte communications with opposing counsel, in an effort to impair that attorney's "preparation." Rule 3.4(f) of the ABA's Model Rules expressly addresses this issue, providing that a lawyer is generally prohibited from requesting a person other than a client to refrain from voluntarily giving relevant information to another party. See Harlan v. Lewis, 982 F.2d 1255 (8th Cir. 1993) (imposing $2500 sanction on attorney for violating rule). Exceptions to this prohibition exist in the Model Rules for witnesses who are relatives of a client or who are employees/agents of a client, provided the attorney reasonably believes that the person's interests will not be adversely affected by refraining from giving that information. ABA Model Rule 3.4(f).

There is no similar provision in the New York Rules and, in fact, such a provision was proposed but rejected by the courts in adopting the new Rules (although without any explanation). Presumably then, an attorney in New York may at least request relatives and employees/agents of clients to refrain from voluntarily speaking with opposing counsel on an ex parte basis and can go further and request the same of other witnesses, so long as the suggestion does not run afoul of the only New York Rules provision which remotely addresses this issue, Rule 3.4(a)(2) (lawyer shall not advise or cause person to hide or leave jurisdiction for purpose of making them unavailable as a witness).

New York City Opinion 2009-5 (2009) (lawyer may ethically ask a witness to refrain from speaking voluntarily to other parties or their counsel).

9. Payments to a Witness.

New York Rule 3.4(b) provides that a lawyer shall not pay or acquiesce in the payment of compensation to a witness contingent on his testimony or the outcome of a case, nor may a lawyer offer any inducements to testify that are prohibited by law. Payment may be made to compensate a witness for expenses and loss of time reasonably incurred in attending or testifying at a proceeding. NY Rule 3.4(b). This has been interpreted to include compensation for time spent preparing for an appearance as well, so long as the compensation is "reasonable" as determined by the market value of the testifying witness' time. ABA Formal Opinion 96 402 (1996); NYSBA Formal Opinions 962 (2013) and 668 (1994); California Formal Opinion No. 1997-149 (1997); Mass. State Bar Assn. Opinion No. 1991-3; Ill. State Bar Assn. Ethics Opinion No. 87-5; Restatement Third of Law Governing Lawyers § 117, cmt. b; see also Prasad v. Bloomfield Health Servs., Inc., 2004 U.S. Dist. LEXIS 9289 (S.D.N.Y. 2004) (nothing improper in the reimbursement of a witness' expenses or in the payment of a reasonable hourly fee for time spent; however, payments to a witness to make them "sympathetic" are inappropriate); New York v. Solvent Chemical Co., Inc., 166 F.R.D. 284 (W.D.N.Y. 1996) (same); Delaware State Bar Ass'n Comm. On Professional Ethics, Opinion 2003-3(2003); but see Goldstein v. Exxon Research and Engineering Co., 1997 WL 580599 (D.N.J. 2009) ("[w]hen a witness is called because of vast personal knowledge . . . public policy dictates that such a witness may not be compensated for his services by a party to the litigation."); Golden Door Jewelry v. Lloyds, 865 F. Supp. 1616 (S.D. Fla. 1996)

(payment to fact witness improper where served as inducement to testify, even though testimony truthful); In re Robinson, 151 A.D. 589 (1912), aff'd, 209 N.Y. 354 (1913) (payments to make witness "sympathetic" impermissible).

In some jurisdictions, any payments to fact witnesses beyond those expressly authorized by statute may be impermissible. See Hamilton v. General Motors Corporation, 490 F.2d 223 (7th Cir. 1973) (refusing to enforce a claim for services by a witness as contrary to public policy); Alexander v. Watson, 128 F.2d 627 (4th Cir. 1942) (any payments to a witness above statutory provision is improper).

Attempts to treat a fact witness as a "paid consultant" will be closely scrutinized. See Rocheux International of New Jersey v. U.S. Merchants Financial Group, Inc., 2009 WL 3246837 (D.N.J. 2009). However, in NYSBA Formal Opinion 668, the Committee drew a distinction between payments to an individual assisting in pre-trial fact finding and payments to that same individual "as a witness." Since DR 7-109(c) (the predecessor to New York Rule 3.4(b)) only applies to witness payments, the Committee concluded that the individual could be paid "any" amount for his pre-trial services and was limited to only "reasonable" compensation for his service as a witness. But see Florida Bar v. Wohl, 842 So.2d 811 (Fla. 2003) ("paying an individual who has personal knowledge of the facts [to assist in pre-trial fact finding] is to pay a witness, whether or not that person is expected to testify.")

Payments contingent on the outcome of the litigation are generally not permitted. Restatement Third of the Law Governing Lawyers, § 117 cmt. b; Florida Bar v. Wohl, 842 So.2d 811.

10. When You Fear Testimony is False.

One of the most difficult issues for lawyers to deal with is what if, after all of this witness preparation, the lawyer either "knows" or "reasonably believes" that the testimony the witness will offer is false? Rule 3.3(a)(3) prohibits a lawyer from knowingly offering or using evidence that the lawyer knows to be false.[9] The obligations of Rule 3.3(a)(3) are triggered by the lawyer's "knowledge" that evidence is false. The definition section of the Rules make it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances. Rule 1.0(k); see also New York County Bar Association Opinion 741 (looking to In re Doe, 847 F.2d 57 (2d Cir. 1988) for guidance on this issue and indicating that while mere suspicion or belief is not adequate, "proof beyond a moral certainty" is not required).

If a lawyer knows that a client or witness intends to testify falsely, the lawyer may not offer that testimony or evidence. (In a criminal context, different rules apply due to the defendant's constitutional right to testify. See NY Rule 3.3(a)(3).) If a lawyer does not know that his client's or witness' testimony is false, the attorney *may* nonetheless refuse to offer it if he or she "reasonably believes" it is false.[10] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact." Rule 3.3, Comment [8]. Thus, short of "knowledge" of falsity, the NY Rules give the lawyer – not the client – the ethical choice in the civil context to refuse to offer or use that testimony or not, as he or she sees fit.[11]

II. COACHING WITNESSES DURING DEPOSITIONS

While it is common practice for attorneys to prepare witnesses prior to depositions taken by their opponent, there are limitations on how much "coaching" attorneys can do during the deposition itself. There have been longstanding debates over whether counsel should be permitted to make objections during the deposition, instruct the witness not to answer, or interrupt the deposition to confer with the witness. While some courts permit some or all of these tactics under certain circumstances, others do not.

The Federal Rules of Civil Procedure 30(d) provide that:

> (1) Any objection during a deposition must be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4).
>
> * * *
>
> (3) If the court finds that any impediment, delay, or other conduct has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.
>
> (4) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26(c). If the order made terminates the examination, it may be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition must be suspended for the time necessary to make a motion for an order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

According to the Advisory Committee Notes from the 1997 Amendments to the Federal Rules, paragraph (3) authorizes sanctions "not only when a deposition is unreasonably prolonged, but also when an attorney engages in other practices that improperly frustrate the fair examination of the deponent, such as making improper objections or giving directions not to answer prohibited by paragraph (1)." The comments stress that making excessive unnecessary objections, as well as refusal to agree on a fair apportionment of time for the deposition or a reasonable request for additional time to complete the deposition, may constitute sanctionable conduct. And, not surprisingly, at least some courts have recognized their inherent authority to sanction misconduct. See, e.g., Sec. Nat'l Bank of Sioux City v. Abbott Labs, 229 F.R.D 595, rev' on other grounds, Sec. Nat. Bank of Sioux City, IA ex rel. JMK v. Day, 800 F.3d 936.

In 2006, the New York State Uniform Court System adopted rules similar to the Federal Rules. McKinney's 2007 New York Rules of Court §221.1-221.3 (22 NYCRR Part 221). These rules provide:

§ 221.1 Objections at Depositions

> (a) No objections shall be made at a deposition except those which, pursuant to subdivision (b), (c) or (d) of Rule 3115 of the Civil Practice Law and Rules, would be waived if not interposed, and except in compliance with subdivision (e) of such rule. All objections made at a deposition shall be noted by the officer before whom the deposition is taken, and the answer shall be given and the deposition shall proceed subject to the objections and to the right of a person to apply for appropriate relief pursuant to Article 31 of the CPLR.
>
> (b) Every objection raised during a deposition shall be stated succinctly and framed so as not to suggest an answer to the deponent and, at the request of the questioning attorney, shall include a clear statement as to any defect in form or other basis of error or irregularity. Except to the extent permitted by CPLR Rule 3115 or by this rule, during

> the course of the examination persons in attendance shall not make statements or comments that interfere with the questioning.

§ 221.2 Refusal to Answer When Objection is Made

> A deponent shall answer all questions at a deposition, except (i) to preserve a privilege or right of confidentiality, (ii) to enforce a limitation set forth in an order of a court, or (iii) when the question is plainly improper and would, if answered, cause significant prejudice to any person. An attorney shall not direct a deponent not to answer except as provided in CPLR Rule 3115 or this subdivision. Any refusal to answer or direction not to answer shall be accompanied by a succinct and clear statement of the basis therefore. If the deponent does not answer a question, the examining party shall have the right to complete the remainder of the deposition.

§ 221.3 Communication with the Deponent

> An attorney shall not interrupt the deposition for the purpose of communicating with the deponent unless all parties consent or the communication is made for the purpose of determining whether the question should not be answered on the grounds set forth in section 221.2 of these rules and, in such event, the reason for the communication shall be stated for the record succinctly and clearly.

These standards set the parameters for depositions in New York state courts. They aim to limit the situations in which attorneys stop depositions to instruct witnesses not to answer questions. See Daniel Wise, "N.Y. Rules Target Lawyer Abuses During Depositions," NYLJ (July 28, 2006). Furthermore, these rules seek to bar attorneys from coaching witnesses by making lengthy objections in which they suggest an answer to the opponent's question. Id. Specifically, attorneys are barred from making objections solely on the grounds of competence, relevance, or hearsay. Id. However, they are permitted to instruct witnesses not to answer on the grounds of privilege, when the question delves into an area barred by a prior court order, or if the question is improper and answering it

would cause "significant prejudice," provided that the attorney "clearly and succinctly" states the reasons for the intervention. Id. Ozkan Terzi & Seyhan Terzi v. Fortune Home Builders, LLC, 2009 N.Y. Misc. LEXIS 4682 (N.Y. Cty. Sup. Ct. 2009) (question must be both improper and prejudicial); see also Layne v. Metropolitan Transportation Authority, 2010 N.Y. Misc. LEXIS 1334 (N.Y. Cty. Sup Ct. 2010) (questions to be answered violative of constitutional rights, privileges or palpably irrelevant); IRB-Brasil Resseguros S.A. v. Portabello International Limited, 2009 N.Y. Misc. LEXIS 3797 (N.Y. Cty. Sup. Ct. 2009) (same).

In addition to their legal obligation, attorneys have an ethical obligation to follow these court rules. New York Rule 3.3(e) provides that "intentionally or habitually violat[ing] any established rule of procedure or of evidence . . . " is misconduct.

Federal courts have also taken various regulatory approaches to control communications between witnesses and attorneys during depositions. Peter M. Panken & Mirande Valbrune, "Enforcing the Prohibitions Against Coaching Deposition Witnesses," Current Developments in Employment Law (July 29, 2004). For example, Rule 30.6 of the Local Civil Rule of the Southern and Eastern Districts of New York provides that "[a]n attorney for a deponent shall not initiate a private conference with the deponent during the actual taking of a deposition, except for the purpose of determining whether a privilege should be asserted." McKinney's 2007 New York Rules of Court § 30.6. This rule, however, is only effective in the Eastern District. Id. Similarly, other districts make only private conferences initiated by an attorney impermissible. See, e.g., U.S. Dist. Ct., S.D. Ind. Local R. 30.1(b). Additionally, some courts distinguish between party and non-party deponents and only prohibit conferences during a deposition between an attorney

and a non-party. See, e.g., U.S. Dist. Ct., Wy. Local R. 30.1(f). Lastly, courts that take the most liberal approach only prohibit attorney consultations with witnesses when a question is pending. See, e.g., U.S. Dist. Ct., S.D. Ind. Local R. 30.1.

Courts have taken a number of approaches through decisional law to address the problem of witness coaching during a deposition. See Panken & Valbrune, at p. 12. Perhaps the lead, and most restrictive, case on this subject is Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa 1993). In Hall, the court held that once a deposition begins, a private conference between a witness and his attorney is not permissible, during the deposition itself or during a recess, unless the purpose of the conference is to decide whether to assert a privilege. Id. at 528-29. This rule applies whether or not the private conference is initiated by the attorney or the witness. Id. at 529. Furthermore, if a conference occurs to determine whether to assert a privilege, the conferring attorney must place on the record the fact that the conference occurred, the subject of the conference, and the decision reached regarding assertion of a privilege. Id. at 530. The court reasoned that "[a] lawyer, of course, has the right, if not the duty, to prepare a client for a deposition. But once a deposition begins, the right to counsel is somewhat tempered by the underlying goal of our discovery rules: getting to the truth." Id. at 528. The court further explained:

> The underlying purpose of a deposition is to find out what a witness saw, heard, or did – what the witness thinks. A deposition is meant to be a question-and-answer conversation between the deposing lawyer and the witness. There is no proper need for the witness's own lawyer to act as an intermediary, interpreting questions, deciding which questions the witness should answer, and helping the witness to formulate answers. The witness comes to the deposition to testify, not to indulge in a parody of Charlie McCarthy, with lawyers coaching or bending the witness's

> words to mold a legally convenient record. It is the witness – not the lawyer – who is the witness. As an advocate, the lawyer is free to frame those facts in a manner favorable to the client, and also to make favorable and creative arguments of law. But the lawyer is not entitled to be creative with the facts. Rather, a lawyer must accept the facts as they develop.

Id. at 528-29.

The court in Hall also held that a witness may not confer with counsel about a document shown to him during a deposition while questions are pending regarding that document. Id. at 529. Furthermore, attorneys are "strictly prohibited from making any comments, either on or off the record, which might suggest or limit a witness's answer to an unobjectionable question." Id. at 531. If a witness does not understand a question or needs further explanation, the witness should ask the deposing counsel for clarification. Id. at 528-29.

The U.S. District Court for the Western District of New York's Guidelines for Depositions, premised upon Hall, provide that "counsel and their witness/client shall not initiate or engage in private off-the-record conferences during depositions or during breaks or recesses, except for the purpose of deciding whether to assert a privilege." See also Chassen v. Fidelity National Title Insurance Co., No. 09-291 (D.N.J. 2010) (applying Hall).

Other courts have refused to strictly adhere to Hall. For example, the court in In re Stratosphere Corp. Securities Litigation, 182 F.R.D. 614, concluded that while it agrees with the Hall court's identification of the problem, it goes too far in its solution, and strict adherence to Hall could violate the witness's right to counsel. Id. at 620-21. The court explained:

> It is this Court's experience, at the bar and on the bench, that attorneys and clients regularly confer during trial and even during the client's testimony, while the court is in recess, be it mid morning or mid afternoon, the lunch recess, [or] the evening recess. The right to prepare a witness is not different before the questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial). What this Court, and the Federal Rules of Procedure seek to prevent is coaching the witness by telling the witness what to say or how to answer a specific question. We all want the witness's answers, but not at the sacrifice of his or her right to the assistance of counsel.
>
> Furthermore, "consultation between lawyers and clients cannot be neatly divided into discussions about 'testimony' and those about 'other" matters.' Mudd v. United States, 255 U.S. App. D.C. 78, 798 F.2d 1509, 1512 (D.C. Cir. 1986). To deny a client any right to confer with his or her counsel about anything, once the client has been sworn to testify, and further to subject such a person to unfettered inquiry into anything which may have been discussed with the client's attorney, all in the name of compliance to the rules, is a position this Court declines to take.

Id. at 621.

In light of this analysis, the court held that it would not preclude an attorney, during a recess that he did not request, from conferring with his client. Id. As long as attorneys do not demand a break in the questioning or demand a break between a question and answer, the court was confident that "the search for truth [would] adequately prevail." Id.

Other courts have agreed with In re Stratosphere Corp. Securities Litigation and adopted a modified, less stringent form of Hall. See Musto v. Transport Workers Union of America, AFL-CIO, 2009 U.S. Dist. LEXIS 3174, at *6, fn. 3 (E.D.N.Y. 2009) (consultation between counsel and witness at a deposition only raises questions when the consultation is initiated by counsel); Okoumou v. Safe Horizon, 2004 U.S. Dist. LEXIS

19120, at *5 (S.D.N.Y. 2004) (same); McKinley Infuser, Inc. v. Brian D. Zdeb, 200 F.R.D. 648, 650 (D. Colo. 2001) (deponents should be prohibited from conferring with their counsel while a question is pending, but consultations during periodic breaks, such as lunch and overnight recess, and longer recesses are appropriate); Odone v. Croda Int'l PLC, 170 F.R.D. 66, 69 (D.D.C. 1997) (court will not "penalize an attorney for utilizing a five-minute recess that he did not request to learn whether his client misunderstood or misinterpreted the questions and then for attempting to rehabilitate his client on the record").

Furthermore, courts have found impermissible witness coaching in situations where attorneys instructed witnesses not to answer questions, suggested answers to a witness, repeatedly objected to the form of questions, made lengthy coaching objections which interrupted the flow of the deposition, made vexatious requests for clarification, and left the deposition room while questions were pending. See Plaisted v. Geisinger Med. Ctr., 210 F.R.D. 527 (M.D. Pa. 2002); Armstrong v. Hussman Corp., 163 F.R.D. 299 (E.D. Mo. 1995); Van Pilsum v. Iowa State Univ. of Science and Tech., 152 F.R.D. 179 (S.D. Iowa 1993); American Directory Serv. Agency, Inc. v. Beam, 131 F.R.D. 15 (D.D.C. 1990). One court even went so far as to justify restrictions on attorney-witness communications during depositions by stating that civil litigants or witnesses, as opposed to criminal defendants, have no constitutional right to advice from counsel during a short recess. McDermott v. Miami-Dade County, 753 So. 2d 729, 731-32 (Fla. Dist. Ct. App. 2000).

Security National Bank of Sioux City, Iowa v. Abbott Laboratories, 299 F.R.D., 595, illustrates at least one trial court's response to inappropriate deposition techniques.

The Court first analyzed defense counsel's deposition objections to the "form" of the questions asked by plaintiff's counsel. After noting the prolific reliance on this objection (the Court calculated that it appeared "on roughly 50% of the pages" of the depositions in issue), the Court dissected the range of use of this objection, which went from quibbles with counsel's word choice (for no apparent purpose other than to coach the witness to a desired answer), to "voice absurdly hyper-technical truths," to assert innovative objection grounds ("a non sequitur"). But the bulk of the Court's criticism of counsel's use of the "form" objection was her failure to provide any explanation for that form objection. As the Court noted, "[r]equiring lawyers to state the basis for their objections is not the same thing as requiring 'speaking objections' in which lawyers amplify or argue the basis for their objections," Id. at 603. (The Court acknowledged that some courts favor a different approach, allowing mere "form" objections, citing to In re St. Jude Med., Inc., Case No. 1396, 2002 WL 1050311 (D. Minn. 2002) or at least allowing references solely to "form" unless the questioner asks for the specific reason, citing to Druck Corp. v. Macro Fund (U.S.) Ltd., 2005 WL 1949519 (S.D.N.Y. 2005)).

The Abbott Laboratories Court next criticized counsel's repeated interjections which prompted specific witness answers. For example, objections were regularly made to appropriate questions claiming they were "vague," "speculative" or "ambiguous," with those objections often followed by the witness' request for clarification or refusal to answer. As the Court noted, "I find it inconceivable that the witness. . . would so regularly request clarification were they not tipped-off by Counsel's objections." Id. at 604-05. The Court went on to observe:

> These clarification-inducing objections are improper. Unless a question is truly so vague or ambiguous that the defending lawyer cannot possibly

discern its subject matter, the defending lawyer may not suggest to the witness that the lawyer deems the question to be unclear. Lawyers may not object simply because *they* find a question to be vague, nor may they assume that the witness will not understand the question. The *witness*—not the lawyer—gets to decide whether he or she understands a particular question:

> Only the witness knows whether she understands a question, and the witness has a duty to request clarification if needed. This duty is traditionally explained to the witness by the questioner before the deposition. If defending counsel feels that an answer evidences a failure to understand a question, this may be remedied on cross-examination.

Serrano, 2012 WL 28071, at *5; *see also Hall*, 150 F.R.D. at 528-29 ("If the witness does not understand the question, or needs some language further defined or some documents further explained, the witness can ask the deposing lawyer to clarify or further explain the question. After all, the lawyer who asked the question is in a better position to explain the question than is the witness's own lawyer." (footnote omitted)); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, Prac. Litig., Sept. 2006, at 15, 16 ("It is improper for an attorney to interpret that the witness does not understand a question because the lawyer doesn't understand a question. And the lawyer certainly shouldn't suggest a response. If the witness needs clarification, the witness may ask the deposing lawyer for clarification. A lawyer's purported lack of understanding is not a proper reason to interrupt a deposition.").

Id. at 604-606.

Another tactic roundly criticized by the Court was Counsel's frequent refrain of "you can answer if you know." The Court noted:

> When a lawyer tells a witness to answer "if you know," it not-so-subtly suggests that the witness may not know the answer, inviting the witness to dodge or qualify an otherwise clear question. For this reason, "[i]nstructions to a witness that they may answer a question 'if they know' or 'if they understand the question' are raw, unmitigated coaching, and are never appropriate." *Serrano*, 2012 WL 28071, at *5; *see also Specht*, 268 F.R.D. at 599 ("Mr. Fleming egregiously violated Rule 30(c)(2) by instructing Mr. Murphy not to answer a question because his answer would be a 'guess.'"); *Oleson v. Kmart Corp.*,

> 175 F.R.D. 560, 567 (D. Kan. 1997) (noting that an attorney violated Rule 30 when he "interrupted [a] deposition in mid-question, objected to the assumption of facts by the witness, and advised the witness that he was not obligated to assume facts").

Id. at 606-07.

Finally, the Court addressed Counsel's efforts at reinterpreting or rephrasing posed questions, and in some instances providing the witness with additional information to consider in answering the questions, sometimes even providing the answer for the witness to then repeat. Needless to say, the Court found all of these tactics inappropriate and allowing the lawyer to effectively commander the depositions.

As noted above, in this particular case, the Court imposed a unique sanction. The Court ordered the offending practitioner to:

> **write and produce a training video in which Counsel or another in Counsel's firm, appears and explains the holding and rationale of this opinion and provides specific steps lawyers must take to comply with its rationale in future depositions in any federal and state court. . . The lawyer in the video must state the video is being produced and distributed pursuant to a federal court's sanction order regarding a partner in the firm, but the lawyer need not state the name of the partner, the case the sanctions arose under, or the court issuing this order.**

The Court required that access to the video be made available to each lawyer at the firm worldwide – more than 2,000 – who engages in state or federal litigation or who works in any practice group in which at least two of the lawyers have filed an appearance in any state or federal case in the United States. Id. at 610.

While the Eighth Circuit Court of Appeals ultimately overturned this sanction based on lack of notice, Sec. Nat. Bank of Sioux City, IA ex rel. JMK v. Day, 800 F.3d

936, if nothing else, Abbott's Laboratories reflects the courts growing frustration with improper witness coaching and deposition conduct.

III. OBSERVATIONS

Those of us involved in litigation cannot imagine our witnesses (especially those who are clients) giving deposition or trial testimony without being adequately prepared. Adequate preparation will involve several dimensions of variables even beyond the witness (e.g. the case, the parties, the documents, the fact finder, etc.) There are, however, two constants – what testimony is needed and how can it be most effectively and persuasively presented. The spectrum of witness preparation styles ranges from a hands off approach (general guidance and preparation but an unrehearsed, spontaneous presentation) to an extensive shaping of the presentation (believing great witnesses are made not born). While most witness preparation occurs somewhere between these two extremes, there is always a line that defines permissible conduct. The reported cases indicate, generally, that attorneys may permissibly:

a. determine a witness's recollection;

b. discuss ways to present that recollection in an effective and accurate manner;

c. discuss legitimate means to protect that testimony from adversarial attack including possible cross-examination;

d. rehearse the testimony;

e. discuss prior testimony to refresh recollection;

f. discuss and reveal the testimony of others to have the witness reconsider his recollection (except if sequestration rules or a sequestration order prohibit such conduct);

g. suggest a choice of words to clarify testimony (not to change substantive testimony or cause false testimony);

h. inform the witness of applicable law and its relation to the events at issue (but not to induce false testimony);

i. discuss the inclusion of testimony not initially mentioned (if the witness has an actual recollection);

j. review the factual context into which the witness's testimony will fit;

k. discuss courtroom or deposition appearance, demeanor, procedure or process; and

l. review documents or other evidence.[12]

But as with most things in life, if done to an extreme it can pass beyond the line of the permissible. Because witness preparation takes place in private, typically under the cloak of attorney client privilege, it rarely sees the light of day (and is rarely subject to discipline). As a result, in this context perhaps more than others, lawyers must determine the direction of their own ethical compass. To do so, each lawyer needs to come to grip with the basic dilemma described earlier in this article: is your view of the line between ethical and unethical conduct one you need to define and then "stay far to the good side of that line," or is it a line you need to "get as close to. . . as you can without crossing over to the bad side?" Most lawyers want to do the "right" thing. This is a context, however, in which defining the right thing can be a complex endeavor.

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Endnotes

[1] The phrase "horse-shedding the witness" has been attributed to James Fenimore Cooper. In Cooper's day there often were carriage sheds near the courthouses where lawyers met with witnesses to prepare them for testifying. See State of Maryland v. Earp, 319 Md. 156 (1990), at n. 6. On occasion, the practice has also been described as "woodshedding" a witness. Id. At other times, it has been described less kindly. Roberta K. Flowers, Witness Preparation Regulating the Profession's "Dirty Little Secret", 38 Hastings Constitutions Law Quarterly 4 (2011); see also John S. Applegate, Witness Preparation, 68 Tex. L. Rev. 277, 309 (1989) (calling witness preparation the profession's "dark little secret".) However, see Jeffrey L. Kestler, Questioning Techniques and Tactics, 9.04, at 494 (2d. Ed. 1992), observing that "there is nothing dirty about witness preparation" but acknowledging lawyers must routinely convince witnesses that there is nothing unethical about it. To many witnesses, for some reason, it just feels "dirty".

2 While a common part of the American system, it is not a part of all justice systems. For example, witness preparation by Barristers is tightly regulated in England and limited to "witness familiarization." Under that system, an English Barrister (trial advocate) is permitted to familiarize a witness with courtroom procedures, inform the witness about the need to testify clearly, and instruct the witness how to withstand the rigors of cross-examination. As advertised by one of England's leading witness-preparation consulting firms, "[m]ock questioning is expressly permitted to give a witness greater familiarity and confidence in the process of giving oral evidence, provided the exercise is not based on facts which are the same as or similar to those of any current or impending trial." See Brad Rudin and Betsy Hutchings, England & U.S.: Contrasts in Witness Preparation Rules **NYPRR (March 2006), citing to http://www.bondsolon.com. Paragraph 705(a) of the Code of Conduct of the Bar Council of England and Wales** provides: "[a] Barrister must not rehearse, practice or coach a witness in relation to his evidence." See Lewis, "Witness Preparation: What is Ethical, and What Is Not," 36 ABA Litigation (Winter 2010).

[3] One commentator has suggested that the breath of this delineation is so great that "[i]t would be hard to find any type of preparation short of the lawyer instructing the witness to fabricate a story that would not be defensible" under it. Peter J. Henning, The Pitfalls of Dealing with Witnesses in Public Corruption Prosecutions, 23 The Georgetown Journal of Legal Ethics, 351, 358 (2010).

[4] The term "false" is not explicitly defined in the NY (or ABA Model) Rules, despite repeated references to the prohibition against an attorney using or offering "false" evidence. Nonetheless, there are various indicators that the Rules contemplate a meaning for "false" that extends far beyond that which is prejurious or fraudulent and includes that which is merely untrue or wrong.

First, both the Model Rules and the New York Rules separately reference "fraudulent" conduct (see, e.g., Rule 3.3(b)) and define "fraud" or "fraudulent conduct" as something that has a "purpose to deceive" and has an element of "scienter deceit, intent to mislead." Rule 1.0(i). On the other hand, although not defined in the Rules, "false" is defined by Black's Law Dictionary to simply mean "untrue." Thus, the plain meaning of these different terms suggests a broad meaning for "false." See also New York State Bar Association Formal Opinion 837 (2010) (noting that while Rule 3.3(b) applies in the case of fraud, Rule 3.3(a) "requires a lawyer to remedy false evidence even if it was innocently offered").

Second, if only deliberate falsehoods were prohibited by the Rules, certain provisions of the Rules would become superfluous. For example, compare NY Rule 3.3(a)(3) (dealing with "false" evidence) with NY Rule 3.3(b) (dealing with "criminal" or "fraudulent" conduct); the Rules would not need both provisions if "false" were limited to "fraudulent" conduct or evidence. Similarly, the broader interpretation of "false" makes the most sense in light of the lawyer's duty in Rule 3.3(a)(1) to correct his or her own previous false statement. If "false" were to mean only deliberately false statements, it would not make much sense to separately prohibit a lawyer from both making such a statement and from later failing to correct that same misstatement. However, if "false" means inaccurate or untrue, then a separate duty to correct is more understandable.

Another clue comes from the original Comment to ABA Model Rule 3.3, in which the drafters discussed the duty to take remedial steps in cases of perjured testimony *or* false evidence, suggesting that the drafters recognized perjury and false evidence as two separate categories of evidence and meant the Model Rule to

apply equally to both. Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering, 29-20 (Aspen Publishers 2009).

The Restatement (Third) of the Law Governing Lawyers also resolves this issue in favor of the broader reading. Section 120(1)(c), much like the Model Rules and the New York Rules, provides that "[a] lawyer may not . . . offer testimony or other evidence as to an issue of fact known by the lawyer to be false" and, if the lawyer has offered evidence of a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures, including disclosure. Comment d to §120 states:

> False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness had been instructed to say. . . . *[A]lthough a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false.* (emphasis added).

Thus, under the Restatement, "false" refers not only to deliberate falsehoods, but also to erroneous or untrue statements.

Case law and ethics opinions from other jurisdictions have interpreted similar language as encompassing the broader reading of the term "false" as well. See, e.g., Morton Bldg., Inc. v. Redeeming Word of Life Church, 835 So.2d 685, 691 (La. App. 1st Cir. 2002) (citing Washington v. Lee Tractor Co, Inc., 526 So.2d 447, 449 (La. App. 5th Cir.), writ denied, 532 So.2d 131 (La. 1998)) ("[F]ailure to correct false evidence, even if originally offered in good faith, violates Rule 3.3 of the Rules of Professional Conduct."); Washington State Bar Opinion 1173 (1988) (if the proceeding was still pending, the lawyer would have had to disclose his client's mistaken, but not fraudulent, failure to provide certain dates and medical treatments in answers to interrogatories). See also *Cyrus* Mehta, What Remedial Measures Can A Lawyer Take to Correct False Statements Under New York's Ethical Rules? 12th Annual AILA New York Chapter Immigration Law Symposium Handbook (2009 ed.); Hazard and Hodes, The Law of Lawyering, 29-20.

In sum, although the term "false" is not explicitly defined, it appears that the drafters of the NY Rules likely meant "false" to mean untrue, encompassing more than just deliberate falsehoods.

[5] The district court decision was overturned by the United States Court of Appeals for the Eighth Circuit primarily because "no advance notice was given of the unusual nature of the sanction being considered." The Eighth Circuit Court of Appeals did not specifically rule on the appropriateness of the sanction itself. Sec. Nat. Bank of Sioux City, IA ex rel. JMK v. Day, 800 F.3d 936, 944-45 (8th Cir. 2015).

[6] Hence the reference to the practice as the profession's "dark" and "dirty" secret and the frequent belief by witnesses that there is something improper about it. See footnote 1, supra.

[7] When a witness is asked to state all of the details of an event that she can remember, that process of remembering is called "recall." This process leads to limited recollection of details, but that recollection tends to be very accurate. When a witness is asked to respond to specific questions about whether she saw particular details in connection with events she witnessed, that process of remembering is called recognition. This process tends to produce more details but they tend to be less accurate. Wydick, The Ethics of Witness Coaching, supra p. 15, at 42.

[8] Robert Traver was the pen name of Michigan Supreme Court Justice, John D. Voelker. See Gerald L. Shargel, "Symposium: Ethics and Evidence: The Application or Manipulation of Evidence Rules in an Adversary System: Federal Evidence Rule 608(b): Gateway to the Minefield of Witness Preparation", 76 Fordham L. Rev. 1263, 1276 (2007); Erin C. Asborno, "Ethical Preparation of Witnesses for Deposition and Trial", Trial Practice ABA Section of Litigation, Summer 2011, Verdict 25:3.

[9] As noted earlier, "false" evidence encompasses much more than perjured testimony and extends to testimony that is untrue or wrong. See footnote.3 supra.

[10] In a criminal proceeding, given the defendant's constitutional right to testify, a lawyer faced with a client who is going to testify falsely may have the option of offering the testimony in a narrative form. See Rule 3.3(a), cmt. 7.

[11] If a lawyer only comes to learn of the falsity of testimony after it is offered, she will have a remedial obligation to the tribunal. New York Rule 3.3(a)(3) requires that if a lawyer's client or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer must take reasonable remedial measures, *including, if necessary, disclosure to the tribunal*. In other words, disclosure may be required to remedy false evidence by the lawyer's client or witness, as a last resort, even if the information to be disclosed is otherwise "protected" client confidential information. This marks a significant departure from the New York rules in effect under the former Code of Professional Responsibility.

[12] See Richard Alcorn, "Aren't You Really Telling Me…? Ethics and Preparing Witness Testimony," supra p. 26 ("Do we implant memories? Yeah, probably we do. Is that something that is wrong? I don't believe it is."); see also John W. Allen, "Emerging from the Horse-Shed and Still Passing the Smell Test: Ethics of Witness Preparation and Testimony", Lawyer Trial Forums.