

EMERGING FROM THE HORSE SHED, AND STILL PASSING THE SMELL TEST - - ETHICS OF WITNESS PREPARATION AND TESTIMONY.

By: John W. Allen

It was in this room and in this old courthouse [in White Plains, New York] that William J. Fallon began the practice of law as a member of the firm of Hunt, Fallon & Smith. It was concerning this court that James Fenimore Cooper coined the phrase: "Horse-shedding the witness." There were carriage sheds near the courthouse in Cooper's day, where attorneys lingered to rehearse witnesses. Mr. Hunt could remember the sheds right well, and if he had had a mind to do so, could have told of indulging in no little "horse-shedding" himself.



Gene Fowler, *The Great Mouthpiece: A Life Story of William J. Fallon* 93 (1931). Cited in *McElheny's Trial Notebook*, 3d Ed., 49 (ABA, 1994).

I. WITNESS PREPARATION.

A. Summary of the Law - Interviewing and Preparing Prospective Witness.

Restatement of the Law Third, The Law Governing Lawyers, Section 116.

1. A lawyer may interview a witness for the purpose of preparing the witness to testify.
2. A lawyer may not unlawfully obstruct another party's access to a witness.
3. A lawyer may not unlawfully induce or assist a prospective witness to evade or ignore process obliging the witness to appear to testify.
4. A lawyer may not request a person to refrain from voluntarily giving relevant testimony or information to another party, unless:
 - a. the person is the lawyer's client in the matter; or
 - b. (i.) The person is not the lawyer's client but is a relative or employee or other agent of the lawyer or the lawyer's client, and

(ii.) The lawyer reasonably believes compliance will not materially and adversely affect the person's interests.

B. Okay to Talk to Witness.

1. Extensive witness preparation is an expected and even essential part of trial preparation. Section 116 of the *Restatement of the Law Third, The Law Governing Lawyers* expressly permits interviews with a witness for the purpose of preparing testimony, and Comment (b) to Section 116 lists a wide range of permissible witness preparation activities.

Inviting the witness to provide truthful testimony favorable to the lawyer's client;

Discussing 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, a lawyer may not assist the witness to testify falsely as to a material fact. (see §120(1)(a)).

2. Not all of these receive universal approval. E.g. *Geders v U.S.*, 425 U.S. 80, 90 n. 3 (1976) (“[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it”); *Hall v. Clifton Precision*, 150 FRD 525 (D.C. E.Pa. 1993); *State v. Blakeney*, 408 A.2d 636 (Vt.

Sup.Ct. 1979).

3. But ethical discipline is rare.

“Reported disciplinary cases on attempts to influence testimony involve subornation of perjury or similarly flagrant misconduct in which the lawyer overtly tries to induce clients or witnesses to give testimony that the lawyer knows is false or knows that the witness believes is false.” E.g., *In re Attorney Discipline Matter*, 98 F.3d 1082 (CA 8 1996); *In re Mitchell*, 262 SE 2d 89 (Ga. Sup.Ct. 1979); *Goodsell v Mississippi Bar*, 667 So.2d 7 (Miss. Sup.Ct. 1996); *Harrison v Mississippi Bar*, 637 So. 2d 207 (Miss. Sup.Ct. 1994); *In re Oberhellmann*, 873 S.W.2d 851 (Mo. Sup.Ct. 1994); *In re Edson*, 530 A.2d 1246 (NJ Sup.Ct. 1987); *In re Stroh*, 644 P.2d 1161 (Wash. Sup.Ct. 1982). All reported at 14 ABA/BNA *Lawyer’s Manual on Professional Conduct*, No. 2, Special Report, 2/18/98.

C. Relevant Ethics Rules.

Several of the ABA Model Rules of Professional Conduct (MRPC) potentially bear on a lawyer’s ethical responsibility when preparing witnesses. A lawyer may **not**:

Counsel or assist a client in conduct that the lawyer knows is criminal or fraudulent (Rule 1.2(d));

Offer evidence that the lawyer knows to be false (Rule 3.3(a)(4));

Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation (Rule 8.4(c)); or

Engage in conduct prejudicial to the administration of justice (Rule 8.4(d)).

The ABA November, 2000, Report of the Commission on Evaluation of the Rules of Professional Conduct (“Ethics 2000”) makes no changes to the effect of these Rules.

D. MRPC 3.4(b).

1. Rule 3.4(b) states that a lawyer must not “counsel or assist a witness to testify falsely.” Many courts also impose a “knowledge” requirement. See, e.g., *In re Shannon*, 876 P.2d 548, modified on other grounds, 890 P.2d 602 (Ariz. Sup.Ct. 1994) (lawyer did not know that revised answers to interrogatories were untrue so as to permit finding that he violated MRPC 3.4(b)); see also *Restatement of the Law Third, The Law Governing Lawyers* § 120(1) (lawyer may not “knowingly counsel or assist a witness to testify falsely” as to material issue of fact). See also Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 343 (1989). Under the MRPC Terminology section, “knowledge” means “actual knowledge,” but such knowledge may be inferred from circumstances.

2. The earlier Model Code of Professional Responsibility's (MCPR) DR 7-102(A)(6) provided that a lawyer must not participate in creating evidence when the lawyer knows or "it is obvious" that the evidence is false. See *Florida Bar v. Lopez*, 406 So.2d 1100 (Fla. Sup.Ct. 1981) (lawyer disciplined for urging testimony that referee found lawyer "knew, or should have known," was false).

3. MRPC's definition of "knowledge" suggests that a lawyer may be found to have the requisite state of mind under MRPC 3.4(b) when the evidence shows the lawyer actually knew or *must have known* that his witness preparation would assist a witness in testifying falsely. See Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 18 (1995) (requisite knowledge exists when a lawyer knows that witness is "practically certain" to interpret lawyer's conduct as inducement to testify falsely).

4. Contra: *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching."* 1 Geo. J. Legal Ethics 389, 404 n. 71 (1987) (likely that attorney may be disciplined under MRPC 3.4(b) for constructive knowledge or what attorney "should have known"). This is consistent with the view that MRPC is a set of strict liability, quasi-criminal rules.

E. Fuzzy Boundaries from the Courts – "The Lecture."

1. **As a general rule, lawyers are permitted to tell witnesses about the applicable law and necessary proof.** *Restatement of the Law Third, The Law Governing Lawyers* § 116, Comment b; *State v McCormick*, 259 SE 2d 880 (NC Sup.Ct. 1979); Nassau County (N.Y.) Ethics Opinion 94-6 (1994) (lawyer may inform client about law before getting client's version of facts as long as lawyer in good faith does not believe that he or she is participating in creation of false evidence).

2. From *Anatomy of a Murder* and Robert Traver (also the Honorable John D. Voelker, Michigan Supreme Court Justice and Trout Fisher EExtraordinaire):

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 and bad, very bad. 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?"

Anatomy of a Murder, 35 (St. Martin's Press, 1958)