

Horse-shedding, Lecturing and Legal Ethics

By Edward Carter¹
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It is the rare witness who testifies without having been prepared to testify by the lawyer calling him. Normally a substantial amount of time passes (usually at least a year if not several years) between the event about which a witness will testify and the date of his testimony and because of that if the witness testifies “cold,” that is without preparation, the witness often will not have thought about the event about which he will testify since it occurred and as a result he may have difficulty both remembering the details of the events and describing them coherently. Putting an unprepared witness on the witness stand can result in exchanges on the witness stand such as the following:

Attorney: “Please don’t shake your head. All your answers must be oral. Did you travel to London?”

Witness: “Oral.”²

Sometimes referred to as horse-shedding, a term coined by James Fenimore Cooper in the era when horse sheds were close to every rural courthouse and attorneys who rode circuit used them as a place to talk to witnesses before trial, witness preparation is not only ethical when properly done, but is part of what every diligent lawyer must do to prepare for trial. When improperly done it can lead to perjury and professional discipline against the attorney. For that reason it is critically important for attorneys to understand the ethics of witness preparation.

When preparing a witness for trial a lawyer can meet with the witness to discuss the witness’s role in the trial as well as explain what constitutes effective courtroom demeanor. During the meeting with the witness the lawyer can also discuss what the witness remembers, reveal the expected testimony of other witnesses, and review with the witness the questions that the lawyer will ask at trial. The witness can also be shown any physical evidence such as documents that will be introduced and about which the witness will be questioned and the witness can be told about the expected lines of cross-examination. As part of the process of witness preparation the lawyer can also rehearse the witness’s actual testimony and suggest a choice of words.³ If the witness had previously made a statement and a memorandum of that statement was made, for the purpose of refreshing the witness’s recollection the lawyer can show the memorandum to the witness.

There are a number of witness preparation practices that are controversial and in some cases that violate the law or the rules of professional responsibility, or both. Some of those practices are discussed below.

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²Gary Slapper. *The Law Explored: preparing witnesses*. TIMESONLINE, April 25, 2007. http://business.timesonline.co.uk/tol/business/law/columnists/gary_slapper/article1700573. Site last visited March 30, 2008.

³*Restatement of the Law Third, The Law Governing Lawyers*, §116, Comment (b).

1. The Lecture

One of the oldest witness preparation practices is called the lecture. While frequently used in connection with the initial interview of a defendant-client, it is also sometimes used when interviewing witnesses. As practiced, before hearing the client or witness's version of what occurred, the lawyer explains the law relating to the charged offense or the law relating to a possible defense and frequently the law relating to both and then asks the client or witness to tell him her version of the events. The lecture is frequently criticized by legal academics as violating Model Rule of Professional Conduct 3.4(b) which prohibits a lawyer from falsifying evidence or counseling or assisting a witness to testify falsely⁴ or at least as bordering on such a violation⁵ because, it is argued, it encourages a defendant or witness to falsely tailor her testimony to the applicable law. Despite those criticisms, the practice of explaining the law before hearing the client or witness's version of the events has been approved by courts⁶ and ethics committees of bar associations.⁷

2. Simultaneous Interviews

Simultaneous interviews of potential witnesses do not violate any rule of professional responsibility, but as a practical matter they should be avoided. A simultaneous interview of witnesses may be an efficient use of time, but if opposing counsel brings it out during trial, such an interview can give the appearance of collusion, can weaken the strength of the witness' testimony in the eyes of the trier of fact, and sometimes so weaken the witness's testimony as to render it worthless. Simultaneous witness interviews also can make it difficult to learn exactly what happened because the witnesses may try to align their testimony instead of openly relating what they believe they saw or heard.

3. Exclusion Orders and Revealing Testimony

At the start of any criminal trial the prosecutor and the defense attorney almost always make a joint motion to exclude witnesses from the courtroom. Courts routinely grant these motions. It is a violation of the exclusion order to provide a witness who has not yet testified with a transcript of another witness's testimony or to relate a summary of the witness's testimony to a witness who has not yet testified.

4. Obstructing Access to a Witness

The law recognizes that in a criminal case both the prosecution and the defense have an equal right to interview witnesses⁸ and Model Rule of Professional Conduct 3.4(a) prohibits an attorney from obstructing another party's access to a witness. A witness has a right to refuse to talk to an attorney who is seeking to interview her and she may choose not to talk to the prosecutor or the defense attorney or both. It is improper for a lawyer who does not represent the witness to tell the witness not to speak to the attorney for the other

⁴J. Alexander Tanford. *The Ethics of Evidence*, 25 AMERICAN JOURNAL OF TRIAL ADVOCACY 487 (Spring 2002).

⁵Lisa Salmi. *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Depositions and Trial*, 18 Rev. Litig. 135 (1999).

⁶*State v. McCormick*, 298 N.C. 788 (1979).

⁷*Nassau County Bar Op. No. 94-6* (1994).

⁸*Kines v. Butterworth*, 669 F.2d 6 (1st Cir. 1981)

side and it is improper for an attorney to insist that he be present when the witness meets with the opposing side.⁹

As important as it is to prepare witnesses for trial, as the following colloquy illustrates, the attorney preparing a witness must not lose sight of the fact that she, too, must be both prepared for and attuned to what she is saying and the questions she is asking:

Lawyer: “So, your baby was conceived on July 12?”

Witness: “Yes.”

Lawyer: “And what were you doing at that time?”¹⁰

⁹*See, International Business Machines Corp. v. Edelstein*, 526 F.2d 37 (2nd Cir. 1975).

¹⁰*Gary Slapper at Note 2.*