Ten Degrees of Separation

How to Avoid Crossing the Line on Witness Preparation

By John Gaal and Louis P. DiLorenzo

Witness preparation is 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.

Attorneys often meet with witnesses before they give testimony to discuss with them what they should expect at an upcoming proceeding. 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.[1]

This representation of clients, however, must 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."[2] As noted by the N.Y. 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.[3]

The *Restatement (Third) of the Law Governing Lawyers* § 116, Comment b broadly[4] 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 observa-

> tions 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." It also 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."

So, how does an attorney discern what is permissible and what constitutes crossing the line? Below are 10 steps to follow as you walk the line.

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.[5] Under New York Rules of Professional Conduct Rule 3.4(b) (RPC), 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."[6] 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."[7] 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.[8]

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 N.Y. 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,[9] 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.[10]

Anatomy of a Murder is a story of a criminal defense attorney, Biegler, and his client, Army Lt. 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."[11] 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

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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?"[12]

There appears to be no per se ethical prohibition against the simultaneous preparation of multiple witnesses.

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."[13] 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 D.C. 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.[14]

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.[15]

In *Ibarra v. Harris County Texas*,[16] 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."[17] 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 goes too far.[18]

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.[19] 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.[20]

In *Professional Conduct and the Preparation of Witnesses for Trial*,[21] 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 . . . ."[22]

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

A witness preparation Memo and the EEOC/Mitsubishi letter[23] 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.[24]

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.[25] One court, the Sixth Circuit,[26] 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 create 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.[27]

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.[28]

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 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.[29] 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.[30]

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.[31] 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.[32]

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.[33] 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.[34]

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There is no similar provision in the N.Y. 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 N.Y. 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). N.Y.C. Bar Formal Op. 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

N.Y. 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. 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.[35]

If You Push the Limits, Expect the Court's Wrath

In the past 20 years there have been widely publicized rulings involving "witness coaching." Here are three of the more recent cases:

Apple, Inc. v. Samsung

In March of 2014, an expert testified on behalf of Samsung in the celebrated smartphone patent litigation, *Apple, Inc. v. Samsung*. 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 from 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).[1]

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 Security National Bank of Sioux City, Iowa v. Abbott Laboratories

In this lengthy opinion, the court analyzed at great length deposition conduct consisting of a misuse of "form" objections, witness coaching and excessive interruptions.[2] 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.

In re Ronald J. Meltzer and the Departmental Disciplinary Committee for the First Judicial Department[3]

In this recent Appellate Division case,a 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.'"

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 25-year career of a New York attorney.

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 preparations, which often keeps this issue under wraps[4]). But it is also in part due to the tension created by a lawyer's obligation to fully and zealously represent his or her client (a tension that admittedly exists in many ethical contexts).

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1. *See Walking the Line: Don't Coach Your Experts* (Re: *Apple v. Samsung*), Ryan H. Flax, The Litigation Consulting Report, April 29, 2014; Law 360, B. Winegarner (subscription required) and Law 360, 4 Tips for Prepping a Witness Without Crossing the Line, Erin Coe.

2. *The Security National Bank of Sioux City, Iowa v. Abbott Laboratories* (N.D. Ia. 2014).

3. 2015 N.Y. Slip Op. 08945 (1st A.D. Dec. 3, 2015).

4. 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.

In some jurisdictions, any payments to fact witnesses beyond those expressly authorized by statute may be impermissible.[36]

Attempts to treat a fact witness as a "paid consultant" will be closely scrutinized.[37] However, in NYSBA Formal Op. 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 N.Y. 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.[38]

Payments contingent on the outcome of the litigation are generally not permitted.[39]

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. 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 makes it clear that the terms "knowingly," "known" and "know" require "actual knowledge," although it is recognized that knowledge can be inferred from the circumstances.[40]

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.[41] 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.[42] However, "[a] lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact."[43] Thus, short of "knowledge" of falsity, the N.Y. Rules give the lawyer – not the client – the ethical choice in the civil context to refuse to offer or use that testimony as he or she sees fit.[44] ■

1. *See* N.Y. Rules of Professional Conduct 1.1(a) (N.Y. Rule), "A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation"; *see* ABA Model Rule of Professional Conduct, Rule 1.3 ("[a] lawyer shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule); *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998) (observing that a lawyer has an ethical duty to prepare a witness).

2. Elkan Abramowitz & Barry A. Bohrer, *White Collar Crime: Handling Witnesses: The Boundaries of Proper Witness Preparation*, N.Y.L.J. May 2, 2006, p.2; *see also* Liisa 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 (1979) ("[L]awyers commonly, and quite properly, prepare witnesses for testimony …").

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

4. One commentator has suggested that the breadth 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 J. of Legal Ethics, 351, 358 (2010).

5. *See* John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 300–04 (1989); Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 197–99 (2d ed. 1998).

6. ABA Model Rule 3.4(b).

7. *Restatement (Third) of the Law Governing Lawyers*, Section 116 cmt. B (2000); *North Carolina v. McCormick*, 298 N.C. 788 (1979).

8. Salmi, *supra* note 2, at 154.

9. Prof. Richard Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1 (1995).

10. 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.

11. *Id*. at 32.

12. *Id*. at 35.

13. Letter from Mark Twain to George Bainton (October 15, 1888), www.twainquotes.com.

14. *See also* W. William Hodes, *The Professional Duty to Horseshed Witnesses Zealously, Within the Bounds of the Law*, 30 Tex. Tech. L. Rev. 1343, 1363 (1999) (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*, N.Y.L.J., 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, cmt. b ("A lawyer may suggest choice of words that might be employed to make the witness's meaning clear.").

15. *See* Gordon, *supra* note 14 ("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*," 44 Arizona Attorney 15 (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 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).

16. 243 Fed. Appx. 830 (5th Cir. 2007).

17. *Id*.

18. *See* Joseph D. Piorkowski Jr., *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of Coaching*, 1 Georgetown J. of Legal Ethics, 389 (1987).

19. *See, e.g.*, Steven Lubet & J.C. Lore, NITA Modern Trial Advocacy: Analysis and Practice 76 (5th ed. 2015); Similarly, preparation – or practice – for the purpose of making the witness more comfortable and credible seems to fall within the scope of permissible preparation. *See* Gordon, *supra* note 15; Liisa 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 (1979); *North Carolina v. McCormick*, 298 N.C. 788 (1979).