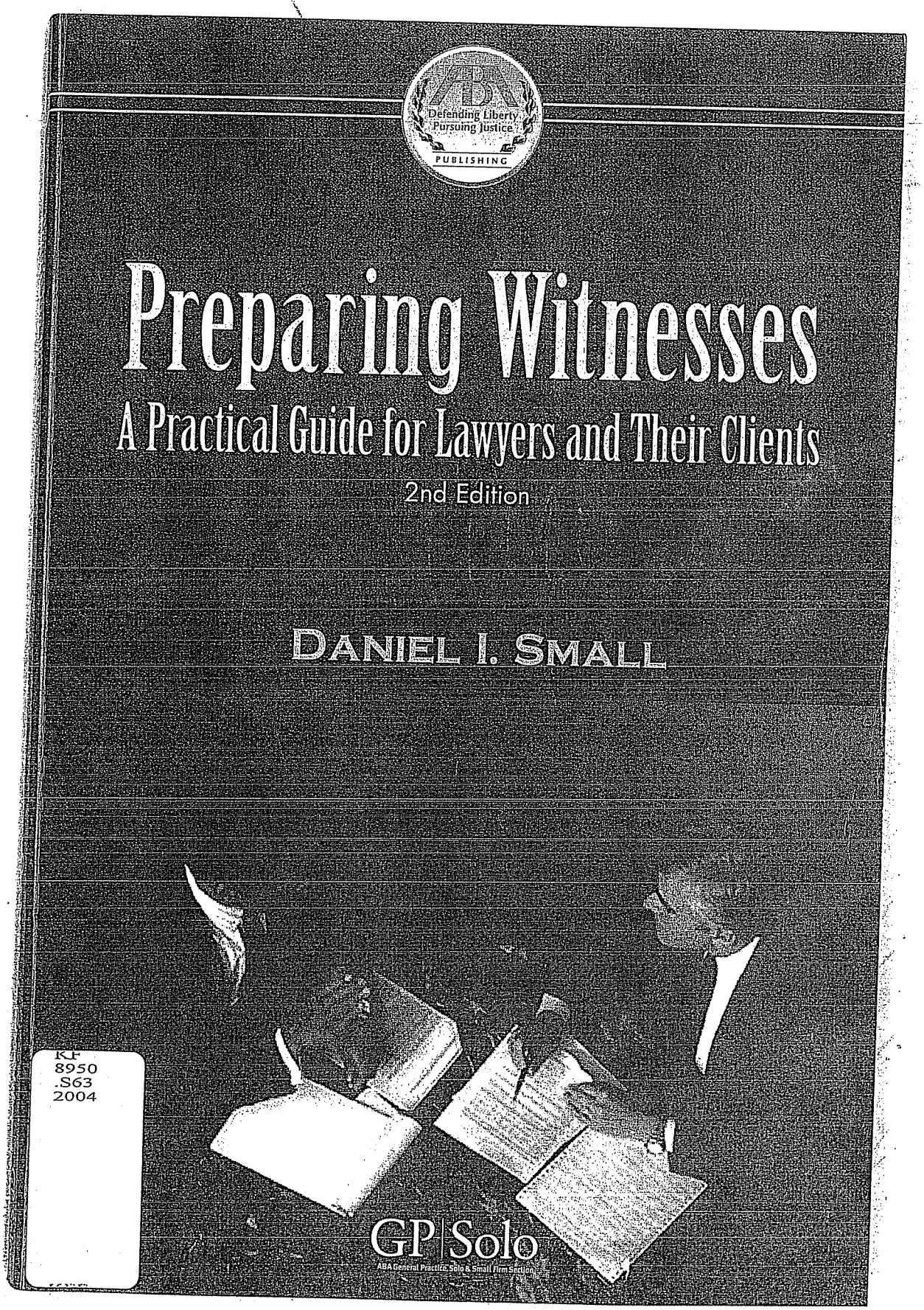
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If you know your client did not commit the crime, this makes the decision much easier.

- *Baggage.* Regardless of guilt or innocence, if the client has so much baggage either related to the crime or unrelated but admissible if he or she takes the stand, then this will have an effect on your decision. For example, if you put the client on the stand will a prior conviction come in? Are unrelated acts going to become admissible?
- *Ability.* Different people are better or worse at testifying. Before putting a criminal defendant on the stand, you have to evaluate the client's ability to express himself or herself. This does not mean how articulate or how well spoken the client is; it is a determination of how he or she comes across. Will the jury believe your client? This is an important consideration because if the jury believes your client is lying on the stand, none of the other evidence will matter. You can turn a very close case for the prosecution into a slam-dunk for them by having a client who appears to be lying, even if he or she is telling the truth.
- *Desire.* Whether the defendant wants to take the stand or not is also an important consideration. A defendant who thinks taking the stand is abhorrent is not likely to make a good witness.

Deciding whether or not to place a criminal defendant on the nd involves weighing many critical factors. There is no way to ke the decision properly without full and candid discussion with ır client. The interplay of legal and factual issues can be com-:ated and uncertain. As a result, the decision may be easy or d, but in any event, it should not be made out of ignorance.

22 The Ethics of Witness Preparation

> "The lawyer'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, 37 N.Y. 161, 171 (N.Y. 1880)

PREPARING THE WITNESS thrusts the lawyer into an inevitable conflict that is inherent in our legal system. As a lawyer, it is your duty to represent your client with zealousness. This will necessarily require seeking out testimony that is favorable to his or her cause. However, as a lawyer, you also owe the court a duty of honesty and utmost candor, which necessarily requires a search for the truth. While preparing our witnesses to give testimony, we must walk the fine line between these duties without compromising our professional integrity.

In this section we address some of the ethical concerns that must be taken into account by any lawyer preparing a witness to provide testimony. While reading this chapter, keep in mind that the rules governing

attorney conduct vary among jurisdictions. It is important for every lawyer to be knowledgeable concerning the rules applicable in his or her geographic area of practice.

During witness preparation, lawyers must keep in mind what Chief Justice Burger observed when considering the dynamics of witness preparation, ". . . an attorney must respect the important distinction between discussing testimony and seeking to improperly influence it." *Geders v. United States*, 425 U.S. 80, 89 n.3 (1976) While the distinction between the two is crucial, there is in fact little judicial guidance for lawyers. Few court decisions have addressed this issue.

The main source of guidance for lawyers comes from the Model Rules of Professional Conduct. These rules, which are broadly drafted, prohibit lawyers from falsifying evidence or assisting a witness to testify untruthfully or fraudulently. They provide that a lawyer may be disciplined by the bar for counseling or assisting a witness to testify falsely and/or knowingly offering testimony that the lawyer knows is false. While the rules make these prohibitions, they do not provide specific guidance for lawyers who are preparing witnesses to present testimony. They do not clearly delineate when the lawyer has crossed the line between "discussing testimony and improperly seeking to influence it."

Another significant complication for lawyers is that while they are prohibited from offering testimony that they know is false, they must inevitably depend on a witness's sincerity when providing testimony. This is further complicated by the fact that there is no way for a lawyer to determine, with complete certainty, that a witness is telling the truth. Because of this, it is crucial that lawyers who are preparing their witnesses emphasize the importance of ***Rule 3—Tell the Truth*** from the beginning of their interactions with each witness. Emphasizing this rule sets the stage for professional and ethical witness preparation. It also protects both the lawyer and the witness and promotes effective witness preparation.

Stressing the importance of telling the truth from the beginning allows the lawyer in subsequent interactions with the witness to encourage the witness to reexamine aspects of his or her recollection and reject any suggestions that would result in testimony that is false or misleading. It also permits both witness and lawyer to proceed with confidence in the preparation process by acknowledging that all interactions will be guided by this fundamental principle. By emphasizing the importance of sticking to the truth, the lawyer can also protect himself or herself from charges of attorney misconduct and/or subornation of perjury and ultimately protect the integrity of the legal system.

Preparation vs. Coaching

When preparing a witness, a lawyer may suggest that the witness use one word instead of another. For example, the lawyer might instruct a witness to a car accident to use the word "hit" instead of "smashed." A lawyer is also permitted to suggest a choice of words that helps clarify the witness's testimony. There is nothing unethical about making these suggestions regarding the witness's wording, as long as the suggestions do not encourage or result in false or misleading testimony.

However, the line between legitimate witness preparation and unethical witness coaching is fuzzy. This line is always based upon whether you are *helping* someone express themselves truthfully or *telling* them to express something that is not true. This distinction can make the difference between a lawyer who has behaved as a zealous advocate and who has properly prepared a witness, and a lawyer who has suborned perjury and obstructed justice.

As a general rule, if a lawyer's suggestions to his or her client encourage false or misleading testimony, then the lawyer has exceeded ethical boundaries and engaged in "witness coaching." Witness coaching takes place when a lawyer makes suggestions that modify a witness's story and/or create a deviation from the truth. There are two main types of witness coaching:

1. *Where the lawyer **knowingly** urges a witness to testify to something that the lawyer knows is false.* The Model Rules of Professional Conduct define "knowingly" by stating that the lawyer must have actual knowledge that the witness's testimony is false. However, the lawyer's knowledge can be inferred from the circumstances. Therefore, a lawyer cannot ignore what is "plainly apparent."

2. *Where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness (or suggestions) subsequently modify or alter the witness's story.* Because of the malleable nature of human memory, this type of witness coaching is common and is often difficult to avoid.

It is important to remember that suggestions regarding word choice, if not limited appropriately, may result in substantive changes to the witness's testimony. Consequently, the lawyer must always conduct conversations with the witness in the manner that is least likely to result in inaccurate testimony or a change in the witness's testimony that deviates from the truth. If the lawyer consistently reminds the witness about the commitment to tell the truth, a resulting change in the witness's testimony is ethical. However, if the lawyer has reason to believe that the witness is altering testimony because of a desire to assist the lawyer or the client, the lawyer should protect himself or herself and the client by reminding the witness about the importance of sticking to the truth.

What Can You Do?

In preparing a witness to testify, a lawyer is permitted to invite the witness to provide truthful testimony that is favorable to the lawyer's client, as long as the lawyer does not encourage the witness to deviate from the truth. The Restatement of the Law Governing Lawyers provides that as long as it does not elicit false or misleading testimony, preparation consistent with a lawyer's duties to a client and to the court may include:

1. Discussing the role of the witness and effective courtroom demeanor
2. Discussing the witness's recollection and probable testimony
3. 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

4. Discussing the applicability of law to the events at issue
5. Reviewing the factual context into which the witness's observations or opinions will fit
6. Reviewing documents or other physical evidence that may be introduced
7. Discussing probable lines of hostile cross examination that the witness should be prepared to meet
8. Rehearsing the witness's testimony and suggesting choice of words

Both witness and the lawyer share a responsibility for ensuring the truth of the witness's testimony. This means that the witness should never testify to something he or she does not believe to be true. Additionally, as a lawyer, you should never permit the witness to testify to what you, as the lawyer, believe to be false. A belief that the witness's testimony is false should be based on personal knowledge or a firm factual basis. This exists when "facts known to the lawyer or the client's own statements indicate that the testimony is false." (Restatement of the Law Governing Lawyers § 120) Ethical witness preparation must be controlled by these fundamental obligations.

Lawyer Conduct During a Deposition

The limitations on what a lawyer can say and do during a deposition vary among jurisdictions. As a general rule, lawyers are supposed to conduct themselves at depositions with the same formality and solemnity that is mandated in the courtroom. A lawyer may be sanctioned for displaying inappropriate behavior, such as attempting to interrupt the deposition by interjecting non-existent privileges and instructing the witness not to answer a question without having a good faith basis. Additionally, many jurisdictions restrict a witness's ability to interrupt the deposition to confer with his or her lawyer before answering a question asked by opposing counsel. We will examine some of these below.

The Florida Rules of Court impose sanctions for abusive deposition conduct. These rules prohibit "objections or statements which

have the effect of coaching the witness, instructing the witness concerning the way in which he or she should frame a response, or suggesting an answer to the witness." Additionally, instructing a witness not to answer a question and interrupting the deposition for an "off-the-record conference" between the witness and counsel (except when a privilege needs to be preserved) are also prohibited. (S.D. Fla. L.R., Gen Rule 30.1)

Similarly, recent case law in Massachusetts suggests that lawyer and client do not have an absolute right to privately confer during the course of the client's deposition. (*Hall v. Clifton Precision*, 150 F.R.D. 525, 528 (E.D. Pa. 1993)) In this state, courts have ordered that lawyers are prohibited from interjecting non-existent privileges as a basis to instruct a client from answering a proper deposition question. Additionally, the lawyer cannot coach a witness or suggest answers by objecting to a question that is still pending.

In some states, judges are given broad discretion to limit consultation between counsel and witnesses during *brief* recesses in depositions. For example, a recent Florida case upheld a judge's order precluding a lawyer from conferring with his client about details of her alleged injury after the lawyer improperly interrupted the deposition. The order, which did not totally preclude any attorney-client communication, did preclude the lawyer from discussing the circumstances of the accident because the judge found that the witness's lawyer had improperly instructed his client not to answer questions regarding her accident. (753 So.2d 729)

Because of the varying rules governing attorney conduct during a deposition, every practitioner must be knowledgeable on the rules in his or her jurisdiction. In order to protect oneself from court sanctions and protect the integrity of the legal system, a lawyer should be knowledgeable about these rules because they will have a significant effect on the extent of preparation that will be necessary. They will help both the witness and the lawyer anticipate problems that may arise during the course of the deposition and/or proceeding and prepare accordingly.

Conclusion

THE PROCESS WE'VE JUST DESCRIBED has two basic goals: (1) to level the playing field and (2) to allow the witness to take control. The process of being a witness is an extraordinarily deceptive one in that it has all the *appearances* of the questioner being in control. It is the questioner's subpoena, court or conference room, and questions. You must explain to witnesses that if they accept that notion, they lose, because despite all appearances of the questioner being in control, the whole point of the exercise is to get the witnesses' testimony. Because of this, the witness has a right to take control, not in an adversarial way, but in a very simple way, by following these basic rules.

Some years ago, a colleague of mine asked for my help in a divorce case. His client, the wife, had testified in a deposition for one day, but had not finished and was now scheduled for a second day. However, my colleague was on trial in another case, had already had to postpone this second day of deposition several times, and was afraid that the court would not give him another extension (opposing counsel had already refused). Would I step in on short notice and represent her at the continued deposition?

Creed of Professionalism

I revere the law, the judicial system, and the legal profession and will at all times in my professional and private lives uphold the dignity and esteem of each.

I will further my profession's devotion to public service and to the public good.

I will strictly adhere to the spirit as well as the letter of my profession's code of ethics, to the extent that the law permits and will at all times be guided by a fundamental sense of honor, integrity, and fair play.

I will not knowingly misstate, distort, or improperly exaggerate any fact or opinion and will not improperly permit my silence or inaction to mislead anyone.

I will conduct myself to assure the just, speedy and inexpensive determination of every action and resolution of every controversy.

I will abstain from all rude, disruptive, disrespectful, and abusive behavior and will at all times act with dignity, decency, and courtesy.

I will respect the time and commitments of others.

I will be diligent and punctual in communicating with others and in fulfilling commitments.

I will exercise independent judgment and will not be governed by a client's ill will or deceit.

My word is my bond.

wisdom of attorneys accepting representations when former clients are involved," *Silver Chrysler Plymouth, Inc.* v. *Chrysler Motor Corp.*, 518 F.2d 751, 760 (2d Cir. 1975) (Adams, Jr., concurring). For reasons indicated in part 2 of this opinion, we do not perceive a problem under DR 5-105 even though here we are dealing with actual former clients and not merely the lingering effects of the lawyer's representation of the trade association. We find no reason to believe that, in bringing an enforcement action against a former client, the lawyer's exercise of his independent professional judgment on behalf of his present client, the agency, or his loyalty to that client would likely be adversely affected by the prior representation.

We do have a Code-based concern about the possible breach or misuse of confidences that Canon 4 guards against. The inquiring lawyer, in his previous employment, prepared for several clients disclosures to state agencies under state laws concerning the same general subject area as the new federal rules. In this work, the lawyer arguably may have received confidential information. If, at any later date, it becomes apparent that such confidences may be related to the information relevant for the federal enforcement program, the lawyer should immediately recuse himself from enforcement efforts against the company.

The particular facts that lead us to believe that such recusal is not now required are these. First, the inquiring lawyer assures us that it is extremely unlikely he received any such confidential information. In the course of preparation of the disclosure statements, any information remotely relevant to the statutes was disclosed for public scrutiny, thereby losing its confidential character. Second, the requirements of the federal rules are not substantive and do not require particular action. Thus, any confidential information the lawyer may have received is probably irrelevant to federal enforcement action. Third, the federal rules apply only prospectively, so that any confidences the lawyer may have received in the past would not likely relate to matters that may be subject to enforcement action under the rules.

Given these particular facts, we believe that Canon 4 does not require the lawyer to abstain from participating in the enforcement program. The possibility that any confidences will be used against a former client is simply too remote to require a more prophylactic rule. *See* Opinion No. 71.

It is interesting to note that, if the new DR 9-101(F) proposed by the Board of Governors were controlling, the inquiring lawyer would be absolutely prohibited for one year from enforcing the rules against former clients. For that period there would be no factual issues as to whether the nature of a previous client relationship was such as to trigger the inhibitions of Canon 4 (or 5). However, accepting the inquirer's statement of the nature of his prior relationship, we conclude as we do under the present Code's Canon 4.

Inquiry No. 79-5-13
November 20, 1979

Opinion No. 79

DR 7-102(A)(4), (6) and (7); EC 7-26—Limitations on a Lawyer's Participation in the Preparation of a Witness's Testimony

We have been asked to delineate the ethical limitations upon a lawyer's participation in preparing the testimony of witnesses.

The specific inquiry before us arises out of adjudicatory hearings before a federal regulatory agency. The agency's rules of practice provide that direct testimony of witnesses is to be submitted in written form prior to the hearing session at which the testimony is offered; at that session, the witness adopts the testimony and attests that it is true and correct to the best of his or her knowledge and information and then is offered for cross-examination on the testimony thus submitted. The particular questions put by the inquirer are whether it is ethically proper for a lawyer actually to write the testimony the witness will adopt under oath; whether, if so, the lawyer may include in such testimony information that the lawyer has initially secured from sources other than the witness; and whether, after the written direct testimony has been prepared, the lawyer may engage in "practice cross-examination exercises" intended to prepare the witness for questions that may be asked at the hearing.

Although the particular questions posed by the inquiry are appropriate to the procedural background against which they arise, the issues they raise have broader significance. Submission of direct testimony in written form in advance of a hearing at which the witness is subject to questioning about the testimony is a frequent and familiar pattern, but it is by no means the only kind of setting in which lawyers are called upon to assist in the preparation of a witness's testimony. Written testimony is offered in a variety of forms and circumstances; in answers to written interrogatories, for instance; and in all sorts of affidavits. Lawyers are almost invariably involved in the preparation of the former, and frequently in the latter as well. There is also a pattern, somewhat parallel to that of the administrative agency in the present inquiry, to be found in legislative hearings, where witnesses are commonly expected to submit written statements in advance of the appearances before the legislative committees where they then elaborate upon their testimony *viva voce*.[1] Lawyers are frequently involved in the preparation of such legislative statements and testimony also.

In addition, lawyers commonly, and quite properly, prepare witnesses for testimony that is to be given orally in its entirety. In consequence, questions of whether a lawyer may properly suggest the language in which a witness's testimony will be cast, or suggest subjects for inclusion in testimony, do not arise solely in connection with written testimony. For this reason also, the inquirer's questions about "practice cross-examination exercises" is narrower than it needs to be: there may equally well be practice direct examination.

In sum, the ethical issues raised by the inquiry before us apply more broadly than is implied by the particular questions put by the inquirer. In order to present those issues in a more inclusive setting, the questions may usefully be rephrased as follows:

(1) What are the ethical limitations on a lawyer's suggesting the actual language in which a witness's testimony is to be presented, whether in written form or otherwise?

(2) What are the ethical limitations on a lawyer's suggesting that a witness's testimony include information that was not initially furnished to the lawyer by the witness?

(3) What are the ethical limitations on a lawyer's preparing a witness for the presentation of testimony under live examininations, whether direct or cross, and whether by practice questioning or otherwise?

A single prohibitory principle governs the answer to all three of these questions: it is, simply, that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed, should—do whatever is feasible to prepare his or her witnesses for examination.

The governing ethical provisions, which are cast in quite general terms, appear to be EC 7-26 and DR 7-102(A)(4), (6) and (7). The Ethical Consideration reads as follows:

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

The disciplinary provisions are these:

> DR 7-102. Representing A Client Within The Bounds Of The Law.
>
> (A) In his representation of a client, a lawyer shall not:
>
> (4) Knowingly use perjured testimony or false evidence....
>
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

[1] The principal difference between this pattern and that of the adjudicatory proceeding of the kind giving rise to the instant inquiry is, ordinarily, that neither the written statements nor the oral testimony are under oath. This difference is not necessarily a significant one for ethical purposes, however.

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

Curiously, there appear to be no decisions of bar ethics committees directly addressing the line of demarcation between permissible and impermissible lawyer participation in the preparation of testimony from the perspective involved in this inquiry, focusing on the lawyer's conduct rather than on the nature of the testimony; and while there is some authority from other sources, it is scant, and not brightly illuminating.[2] In any event, it seems to us clear that the proper focus is indeed on the substance of the witness's testimony which the lawyer has, in one way or another, assisted in shaping; and not on the manner of the lawyer's involvement. In this regard, the pertinent provisions of the Code, quoted above, do not call for an excessively close analysis. They employ the terms "false," "fraudulent" and "perjured," the terms "testimony" and "evidence," and the terms "illegal" and "faudulent," in a manner that suggests, not that fine differences are intended, but that the terms are used casually and interchangeably. We think therefore, that all of these provisions, so far as here pertinent, are to the same effect: that a lawyer may not ethically participate in the preparation of testimony that he or she knows, or ought to know, is false or misleading.

It follows, therefore—to address the first question here raised—that the fact that the particular words in which testimony, whether written or oral, 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 (leaving aside outright subornation of perjury) in a lawyer's suggesting particular forms of language to a witness to 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 debase 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, where truth shades into untruth, and to refrain from crossing it.[3]

We note that in the particular circumstances giving rise to this inquiry, there is some built-in assurance against hazards of this kind, to be found in the fact that the testimony will be subject to cross-examination—which, of course, may properly probe the extent of the lawyer's participation in the actual drafting of the direct testimony, including whether language used by the witness originated with the lawyer rather than the witness, what other language was considered but rejected, the nuances involved, and so forth. The risk of distortion, whether intentional or unintentional, is obviously greater where (as will often be the case with affidavits or written answers to interrogatories) the testimony is not going to be subject to cross-examination. Nonetheless, even in that context there should be no undue difficulty for a lawyer in avoiding such distortion.

The second question raised by the inquiry —as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness—may, again, arise not only with respect to written testimony but with oral testimony as well. In either case, it appears to us 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 he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance. There are two principal hazards here. One hazard is the possibility of undue suggestion: that is, the risk that the witness may thoughtlessly adopt testimony offered by the lawyer simply because it is so offered, without considering whether it is testimony that he or she may appropriately give under oath. The other hazard is the possibility of a suggestion or implication in the witness's resulting testimony that the witness is testifying on a particular matter of his own knowledge when this is not in fact the cases.[4] For reasons explained above, these hazards are likely to be somewhat less serious in a case like the one giving rise to the present inquiry, where cross-examination can inquire into the source of the testimony, and test its truth and genuineness, than in the numerous situations where written testimony will probably not be followed by any examination of the witness at all. Even in the latter situation, however, there should be no difficulty, for a reasonably skilled and scrupulous lawyer, in avoiding the hazards in question.

We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony—whether the testimony is only to be under cross-examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf. *See Hamdi & Ibrahim Mango Co. v. Fire Association of Philadelphia,* 20 F.R.D. 181, 182-83 (S.D.N.Y. 1957):

> [It] could scarcely be suggested that it would be improper for counsel who called the witness to review with him prior to the deposition the testimony to be elicited. It 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 on deposition or at trial. Wigmore recognizes "the absolute necessity of such a conference for legitimate purposes" as part of intelligent and thorough preparation for trial. *3 Wigmore on Evidence,* (3d Edition) §788.
>
> In such a preliminary conference counsel will usually, in more or less general terms, ask the witness the same questions as he expects to put to him on the stand. He will also, particularly in a case involving complicated transactions and numerous documents, review with the witness the pertinent documents, both for the purpose of refreshing the witness' recollection and to familiarize him with those which are expected to be offered in evidence. This sort of preparation is essential to the proper presentation of a case and to avoid surprise.[5]

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[2] The United States Supreme Court has referred to EC 7-26 and DR 7-102 as embodying "the important ethical distinction between discussing testimony and seeking improperly to influence it," Geders v. United States, 425 U.S. 80, 90 n.3 (1976), but the Court did not elaborate on the distinction.

[3] The United States Court of Appeals for the Fourth Circuit has articulated the line of impermissibility (in the context of the sequestration of a defendant during a short recess in the course of a trial) about as clearly as it can be done:

> The danger...is that counsel's advice may significantly shape or alter the giving of further testimony...that will be untrue or a tailored distortion or evasion of the truth.

United States v. Allen, 542 F.2d 630, 633 (4th Cir. 1976), *cert. denied,* 430 U.S. 908 (1977).

[4] *Cf.* Rule 602 of the Federal Rules of Evidence: A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that he has personal knowledge of the matter.

[5] The court in Hamdi went on to say:

> There is no doubt that these practices are often abused. The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and put-

It matters not at all that the preparation of such testimony takes the form of "practice" examination or cross-examination. What does matter is that whatever the mode of witness preparation chosen, the lawyer does not engage in suppressing, distorting or falsifying the testimony that the witness will give.

Inquiry No. 79-8-27
December 18, 1979

Opinion No. 80

DR 7-104(A)(1)—Communication by Lawyer Representing A Client With Government Officials

We are asked for our opinion on the application of DR 7-104(A)(1) to communications with government officials.[1] DR 7-104 bears the general catchline "Communicating With One of Adverse Interest." DR 7-104(A)(1) provides:

> "(A) During the course of his representation of a client a lawyer shall not:
> (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so."

The questions implied by the inquiry, though not specifically posed, appear to be three: first, whether DR 7-104(A)(1) has any application at all to communications directed to government officials; second, if so, what officials are to be deemed governmental "parties" with whom the rule restricts communications; and third, in what circumstances the restrictions come into play.

These questions raise sensitive issues implicating not only the need to protect uncounselled parties from possible overreaching by attorneys for adverse parties, but also the protection of the rights of the public to petition government officials and agencies. Having weighed all of the considerations which seem to us of principal concern, we have concluded that:

(1) DR 7-104(A)(1) was intended to and, as presently written, does apply to communications between lawyers for private parties and government officials;[2]

(2) The officials who are deemed to be governmental "parties with whom communications under the rule are restricted are quite limited, including only those persons who have the power to commit or bind the government with respect to the subject matter question, whether it be the initiation or termination of litigation, execution or approval of a contract, issuance of a license, award of a government grant, or a rulemaking function; and

(3) DR 7-104(A)(1) applies only in circumstances where the word "party" is applicable in a relatively formal sense—that is, where the government agency or official is involved as a named party in litigation, a party in interest in negotiations (and so a prospective party in litigation if negotiations fail), a party to a contract under negotiation, or a party involved in substantive decisions concerning the issuance of licenses, the award of government grants, or rulemaking proceedings. The rule has no application even in such circumstances unless counsel has specifically been given responsibility for representing the governmental party in the matter and the private party's counsel has effectively been notified of that fact.

I.

A number of decisions from other jurisdictions have addressed the first question—whether the rule has any application at all to communications with government officials—albeit in a more cursory than thoughtful fashion. In all instances but one, the opinions have recognized on direct communications with government officials.[3]

The "legislative history" of the rule is less illuminating than the "case history." A footnote to the catchline of DR 7-104 quotes from Rule 12 of the Rules of the California State Bar, which states that "a member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel," and then goes on to state: "This rule shall not apply to communications with a public officer, board, committee or body." Cal. Business & Professions Code § 6076 (1962). It seems clear from this reference that the framers considered the possibility that the ABA's rule, like the California rule, should have no application in a governmental context. It is not equally clear, however, what choice the framers made in this regard. There are, at least theoretically, two possible views of their intentions: the first is that they intended that DR 7-104(A)(1) should not apply to any communications with governmental officers or bodies, but thought the matter so obvious that it was unnecessary to have the text of the rule say so explicitly; and the second is that they intended that there should not be in the ABA Code the exception found in California's Code, and so wrote a disciplinary rule without any such exception, and called attention to the California provision in order to point out an alternative path which they had thought it better not to follow. Although the matter is not altogether free from doubt, we think the second of these possibilities is substantially the more likely one.

DR 7-104 as a whole is clearly based on former ABA Canon 9, and the decisions thereunder,[4] and none of these sources contains the slightest hint of a governmental ex-

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(Continued from previous page.)

ting words in the mouth of the witness or ideas in his mind. The line must depend in large measure, as do so many other matters of practice, on the ethics of counsel. *Id.* at 1833.

Although this passage might be read broadly to mean that any suggestion by the attorney of language or ideas to the witness is improper, we think it is more correctly read in the narrower sense of a lawyer's suggesting false testimony. Thus, immediately after the passage in question, the court quoted *3 Wigmore On Evidence* (3d ed.) § 788:

> This right may be abused, and often is; but to prevent the abuse by any definite rule seems impracticable.
>
> It would seem, therefore, that nothing short of an actual fraudulent conference for concoction of testimony could properly be taken notice of; there is no specific rule of behavior capable of being substituted for the proof of such facts.

Hamdi & Ibrahim Mango Co. v. Fire Assn. of Philadelphia, *supra*, 20 F.R.D. at 183.

[1] Because this inquiry was broad in scope, posing no particular question but seeking general guidance in a matter that inevitably is of special concern to a wide segment of this Bar, we deemed the matter to be one requiring an opinion of broad scope. Consequently, in accordance with our rules as approved by the Board of Governors, a draft opinion was published so as to elicit comments from the Bar and from interested members of the public before final action was taken concerning this inquiry. We have received at least twenty formal responses to our request for comments, and these responses, along with extensive discussions within the committee and a recent, thoughtful article by Professor John Leubsdorf, have prompted reconsideration and revision of our tentative draft opinion. See Leubsdorf, *Communicating With Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. Pa. L. R. 683 (1979).

[2] While we acknowledge that DR 7-104(A)(1), as it presently exists, requires consent of government counsel in advance of communications with government officials who are deemed with parties under the circumstances we have described, we believe that proposals should be developed to modify the present rule so as to eliminate any need for such consent and to require instead only that notice of intent to communicate with government officials be given counsel in advance of such communications. See discussion, *infra*.

[3] *See* A.B.A. Informal Opinion 1377 (June 2, 1977); New York State Bar Association Opinion 160 (October 9, 1970); State Bar of New Mexico Advisory Opinion, 9 State Bar of New Mexico Bulletin 391 (1971); Florida State Bar Association Opinion 68-20 (June 7, 1968) (digested at 44 Florida Bar Journal 404 (1970)); Oklahoma Bar Association Opinion 212 (September 15, 1961), 32 Oklahoma Bar Journal 1572 (1961); North Carolina Bar Association Opinion 455 (April 17, 1964), 11 N.C. Bar 14 (May 14, 1964); Alaska Bar Association Opinion 71-1 (April 14, 1971) digested at O. Maru, 1975 Supp., Digest of Bar Association Ethics Opinions 40 (1977) (recognizing applicability of ethical restrictions on direct communications with government officials). *See also*, State Bar of Texas Opinion 233 (June 1959), 18 Baylor Law Review 313-314 (1960) (Committee equally divided on applicability of ethical restrictions to direct communications with government officials).

[4] See footnotes 75, 76 and 77, to DR 7-104(A)(1) and (2), as well as footnote 30 which is appended to EC 7-18, the ethical consideration that illuminates this disciplinary rule.

406 So.2d 1100
(Cite as: 406 So.2d 1100)

C

Supreme Court of Florida.
THE FLORIDA BAR, Complainant,
v.
Peter M. LOPEZ, Respondent.
No. 57904.

Nov. 25, 1981.

In a disciplinary proceeding, the Supreme Court held that urging parties and/or witnesses to testify under oath to matters which an attorney knows, or should know, that witnesses do not believe and which are false, warrants a one-year suspension.

Attorney suspended.

Adkins and Boyd, JJ., dissented.

West Headnotes

[1] Attorney and Client 45 ⚿57

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k47 Proceedings
45k57 k. Review. Most Cited Cases
In disciplinary proceedings, referee's findings should be upheld unless clearly erroneous or lacking in evidentiary support.

[2] Attorney and Client 45 ⚿59.13(3)

45 Attorney and Client
45I The Office of Attorney
45I(C) Discipline
45k59.1 Punishment; Disposition
45k59.13 Suspension
45k59.13(2) Definite Suspension
45k59.13(3) k. In General. Most Cited Cases
(Formerly 45k58)
Urging parties and/or witnesses to testify under oath to matters which an attorney knows, or should know, that witnesses do not believe and which are false, warrants a one-year suspension.

*1101 John F. Harkness, Jr., Executive Director, Stanley A. Spring, Staff Counsel and Anita F. Dahlquist, Asst. Staff Counsel, Tallahassee, and Paul A. Gross, Branch Staff Counsel, and Wallace N. Maer and Scott K. Tozian, Bar Counsels, Miami, for complainant.

Elliott Harris of Lopez & Harris, Miami, Everett P. Anderson of Pennington, Wilkinson, Gary & Dunlap, and Richard W. Ervin and Dean Bunch of Ervin, Varn, Jacobs, Odom & Kitchen, Tallahassee, for respondent.

PER CURIAM.

This disciplinary proceeding is before the Court on complaint of The Florida Bar, the report of a referee, and respondent's petition for review. We have jurisdiction. Art. V, s 15, Fla.Const.

The Florida Bar filed a complaint alleging that Peter M. Lopez, a member of The Florida Bar, urged two parties he was suing on behalf of his client to change their future testimony in exchange for general releases from prosecution. After a hearing, the appointed referee filed a report containing the following findings of fact:

That on February 6, 1978, following the termination of a deposition taken by Respondent Lopez in his office located at 28 West Flagler Street, Miami, in a case then pending in the United States District Court, Southern District of Florida, styled "Rafael Gonzalez-Perez v. Sun Bank of Miami, et al." Case No. 77-2225, wherein Respondent represented the Plaintiff, Respondent requested the individual defendants, to wit, J. Zambrana, Humberto Martinez-Marquez, and their counsel, Mark Dienstag, Esq. to remain in the room so that Respondent could speak to them.

Messrs. Zambrana, Martinez-Marquez and attorney Dienstag remained along with Respondent and a discussion of the testimony previously given by the witness, Defendant Jose Roses, occurred.

A key issue in the case was whether Plaintiff had given instruction to Defendant Zambrana to deliver a certain $25,000 cashier's check to Defendant Sun Bank or to put the check on an Aerocondor flight to South America for delivery to Plaintiff. If the latter, a better case against Sun Bank would be made. The witness, Roses, however testified that his instructions were to deliver the check to the Bank.

During that discussion, Respondent stated to those present in the room that (meaning the testimony as given by Roses) was "not what I want to hear; that if you say the check was to go to Aerocondor I'll get you off the hook".

The words and statement uttered by the Respondent were susceptible of no other reasonable interpretation than to mean that if defendants Zambrana and Martinez testified that the instructions were for delivery of the check to Aerocondor, that in exchange for such testimony, he, Respondent Lopez as counsel for plaintiff, would drop those defendants from the suit and proceed against the other defendant, Sun Bank of Miami.

Respondent's statements were partially in English and partially in Spanish and the evidence is at variance as to whether the exact words uttered by Respondent were in English or Spanish; however, there is no issue as to the meaning of the words as heard by the three individuals.

***1102** The witnesses, Zambrana, Martinez-Marquez and their attorney, Mark Dienstag, are credible and their testimony is credible and worthy of belief.

The only conclusion that can reasonably be drawn is that Respondent Lopez was soliciting testimony he knew the witnesses did not believe to be true in exchange for a release of the witnesses from the suit.

The referee then made the following recommendations:

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of his Oath as an attorney, The Integration Rules of The Florida Bar and Disciplinary Rules of the Code of Professional Responsibility, to wit:

Rule 11.01 of the Integration Rule and Disciplinary Rules 1-102A(3), 1-102A(4), 1-102A(5), 1-102A(6), 7-102A(6) and 7-102A(8) of the Code of Professional Responsibility, in that Respondent was urging parties and/or witnesses to testify under oath to matters which Respondent knew, or should have known, that the said witnesses did not believe and which were false.

I recommend that the Respondent be suspended from the practice of law for a period of three months with automatic reinstatement at the end of the three month period of suspension as provided in Rule 11.10(3).

Mr. Lopez has taken exception with the referee's report contending that he is not guilty of the infractions charged and that the evidence is insufficient to support any finding to the contrary.

[1] A referee's "findings should be upheld unless clearly erroneous or lacking in evidentiary support." The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla.1978); The Florida Bar v. Wagner, 212 So.2d 770, 772 (Fla.1968). Here, based on the evidence presented, the referee found that respondent had violated his ethical and professional responsibilities. This conclusion is corroborated by each of the four witnesses' testimony and is reasonable. The evidence presented meets the burden placed on complainant to provide clear and convincing proof of respondent's misconduct. The Florida Bar v. Valantiejus, 355 So.2d 425 (Fla.1978); The Florida

Bar v. Quick, 279 So.2d 4 (Fla.1973); The Florida Bar v. Schonbrun, 257 So.2d 6 (Fla.1971); The Florida Bar v. Rayman, 238 So.2d 594 (Fla.1970). We therefore affirm the referee's finding that respondent violated his attorney's oath, the Integration Rule, and the Code of Professional Responsibility.

[2] We cannot agree, however, with the referee's recommended three-month suspension with automatic reinstatement at the end of that time. Mr. Lopez has committed a serious violation of his responsibilities as a member of the Florida Bar. We feel that a three-month suspension is insufficient to impress on the respondent, the bar, and the public our dissatisfaction with and distress over his conduct. If Mr. Lopez had been convicted in a court of this state of tampering with a witness, he would have been subject to a one-year term of imprisonment.[FN*] Using the witness-tampering statute as a guideline, we find a one-year suspension appropriate in this case.

> FN* s 918.14(2), Fla.Stat. (1977). Inducement not involving force, deception, threat, or offer of pecuniary benefit is a first-degree misdemeanor.

Peter M. Lopez is suspended from the practice of law for one year, effective thirty days from the date of the filing of this opinion, and thereafter until he shall show his rehabilitation through complying with rule 11.11 of the Integration Rule and by obtaining a passing score on the ethics portion of the bar examination. Costs in the amount of $949.00 are hereby taxed against respondent.

It is so ordered.

SUNDBERG, C. J., and OVERTON, ALDERMAN and McDONALD, JJ., concur.
ADKINS and BOYD, JJ., dissent.
Fla., 1981.
The Florida Bar v. Lopez
406 So.2d 1100

END OF DOCUMENT

Analysis
As of: Nov 16, 2009

[THE STATE EX REL.] ABNER ET AL., APPELLANTS, v. ELLIOTT, JUDGE, APPELLEE.

No. 98-1786

SUPREME COURT OF OHIO

85 Ohio St. 3d 11*; *1999 Ohio 199*; *706 N.E.2d 765*; *1999 Ohio LEXIS 554

January 26, 1999, Submitted
March 17, 1999, Decided

SUBSEQUENT HISTORY: As Corrected.

PRIOR HISTORY: [***1] APPEAL from the Court of Appeals for Butler County, No. CA98-02-0038.

Appellants, Donald Lee Abner and over eight hundred other persons, are workers and their representatives who filed actions in the Butler County Court of Common Pleas against various manufacturers, suppliers, installers, and distributors of products containing asbestos. Appellants claimed that they had been injured through exposure to asbestos. Respondent, Judge George Elliott, was assigned to hear all claims pending in these cases. Judge Elliott's orders governing discovery in any single case were binding in the proceedings in all of the cases.

In May 1997, Judge Elliott granted the motion of defendant O.K.I. Supply Co. for a protective order concerning appellants' attorneys' conduct during depositions in the asbestos cases. Among other things, Judge Elliott ordered that in future depositions in the asbestos litigation, counsel would refrain from making speaking objections or attempting to suggest answers or otherwise coach witnesses and that counsel would not confer with witnesses during depositions except to decide whether to assert a privilege.

In August 1997, a document entitled "Preparing for Your Deposition/Attorney [***2] Work Product" authored by Baron & Budd, P.C., a law firm representing appellants in the Butler County asbestos litigation, was disclosed during the deposition of a plaintiff represented by Baron & Budd in unrelated asbestos litigation in Texas. The document was purported to advise plaintiffs in asbestos personal-injury cases to testify in a manner that would not necessarily be consistent with the truth.

Defendant Raymark Industries, Inc. subsequently filed a motion to compel discovery, for a protective order, and for other relief based on its contention that the depositions in the Butler County asbestos litigation established that the plaintiffs had been improperly coached by either the same preparation document used by Baron & Budd in Texas or substantially similar advice. Judge Elliott held a hearing on Raymark's motion at which appellants' counsel conceded that some aspects of the Texas document were shocking and surprising and that the document should never have been used "in the first place." But appellants claimed that neither the Texas document nor anything similar had been used in the Butler County cases.

In September 1997, following the hearing, the court granted Raymark's [***3] motion in part and ordered the following:

"1. Defendants may inquire into and obtain discovery respecting allegedly improper preparation or coaching of witnesses by plaintiffs' counsel, and, or plaintiffs' counsel's agents, representatives and employees.

"2. Defendants may redepose any plaintiff deposed prior to September 17, 1997 respecting alleged witness preparation and coaching.

"3. Discovery shall continue pursuant to the Case Management Order entered June 19, 1997. In any deposition taken after September 17, 1997 the matter of witness preparation and coaching shall be an appropriate area of inquiry.

"4. Any purported invasion of attorney-client privilege shall be brought to the court's attention for in camera review.

"5. Plaintiffs, plaintiffs' counsel, their employees, agents, and, or, representatives are enjoined and restrained from destroying, altering, or modifying in any way any documents, material, videos, photographs, or tangible things whatsoever which have been used, are intended to be used, or are available for use for the preparation of witnesses in this or in any other asbestos litigation involving plaintiffs' counsel. Such documents, materials, and tangible [***4] things shall be produced and made available for inspection and, or, copying by defendants' counsel within ten (10) days after the date hereof. Any claim of privilege involving any such documents, material, or tangible things shall be submitted to the court for in camera inspection."

On reconsideration of the September 1997 order, Judge Elliott entered an order in October 1997 that modified Paragraph 5 of the original order, so that the requested materials would be from asbestos litigation "pending in [Butler] county and in which Baron & Budd represents plaintiffs."

Despite Judge Elliott's September and October 1997 orders, appellants did not provide the defendants in the asbestos cases with any witness preparation documents and, although claiming that all of these materials were protected from disclosure by the attorney work product and attorney-client privileges, appellants did not submit the materials to Judge Elliott for an in camera inspection. In addition, at a November 1997 deposition, after Judge Elliott overruled appellants' objections, appellants' counsel instructed the deponent not to answer questions concerning witness preparation based on work-product and attorney-client [***5] privileges.

As a result of the foregoing actions by appellants, defendant North American Refractories Company filed a motion for sanctions. In December 1997, after a hearing, Judge Elliott issued an order in which he found that the Texas deposition preparation document constituted evidence of improper coaching of prospective deponents, that it was reasonable to infer that similar deposition materials had been used to coach clients and witnesses in asbestos litigation in Butler County that had been filed by the same law firm that prepared the Texas document, that the court thereby issued its Sep-

tember and October 1997 discovery orders, and that appellants had not complied with those orders. Judge Elliott consequently ordered the following:

"Therefore, at the trial of this case, upon request of defense counsel, the jury will be instructed to accept and consider the following as being conclusively proved facts established by the greater weight of the evidence, viz.:

"1. Prior to trial plaintiff and his co-workers met with plaintiff's attorneys and paralegals to prepare for this lawsuit.

"2. At least one such meeting occurred before (a) the preparation of plaintiff's answers to written [***6] interrogatories, (b) the deposition of plaintiff by defendants' counsel, and (c) the deposition of each co-worker.

"3. During each of those meetings, plaintiffs' attorneys or paralegals either gave to or showed plaintiff and the co-workers certain lists, photographs, or other items which disclosed the product name, manufacturer name, product type, product description, packaging description, location of use, time of use, and typical trade or job of the Armco workers who used numerous products manufactured by defendants.

"4. Before, during, or immediately after the disclosure of that information to plaintiff and, or, the co-workers, plaintiff's attorneys informed plaintiff and, or, the co-workers that it would be to their advantage for them to name as many of the defendants' products as possible during their depositions.

"The foregoing instruction shall also be given to the jury in any other asbestos-related personal injury action in this county wherein court-ordered discovery of improper witness coaching techniques either has been or will be prevented by the objections of plaintiffs' counsel."

In February 1998, after the Court of Appeals for Butler County dismissed appellants' attempt [***7] to appeal Judge Elliott's December 1997 order because it was not a final appealable order, appellants filed a complaint in the court of appeals for a writ of prohibition to prevent Judge Elliott from enforcing any of his discovery orders in the asbestos litigation and to specifically find that there was no evidence of a waiver of the attorney-client privilege or any evidence of fraud in any of their cases so as to require an in camera inspection of the privileged materials and testimony. Appellants claimed that Judge Elliott's discovery orders and sanctions were entered without any jurisdiction because they violated their attorney-client privilege.

The defendants in the Butler County asbestos litigation filed an amici curiae brief and Judge Elliott filed a *Civ.R. 12(B)(6)* motion to dismiss the complaint for failure to state a claim upon which relief can be granted. The court of appeals granted Judge Elliott's motion and dismissed the cause.

This cause is now before the court upon appellants' appeal as of right as well as their request for oral argument.

DISPOSITION: Judgment affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, individuals and their representatives who filed actions against defendant asbestos manufacturers and suppliers, filed an appeal from the decision of the Court of Appeals for Butler County (Ohio), which dismissed their complaint for a writ of prohibition against respondent judge, seeking to prevent respondent from enforcing his discovery orders.

OVERVIEW: Respondent judge was assigned to cases filed by appellant individuals against defendant manufacturers and suppliers of asbestos products, which alleged injuries due to

asbestos exposure. Respondent entered discovery orders requiring, among other things, that appellants' counsel refrain from coaching witnesses in depositions, that appellants provide defendants with witness preparation documents, and that appellants' counsel submit to respondent for an in camera inspection those documents for which they claimed work product and attorney-client privileges. When appellants failed to comply, respondent granted a defendant's motion for sanctions. Appellants filed a prohibition complaint seeking to prevent respondent from enforcing his discovery orders. The appellate court granted respondent's motion to dismiss. The court affirmed. Trial courts had the requisite jurisdiction to decide issues of privilege and had extensive jurisdiction over discovery, including inherent authority to impose sanctions for failure to comply with discovery orders. Thus, a writ of prohibition was not appropriate. Further, appellants had an adequate remedy by appeal to resolve respondent's alleged errors.

OUTCOME: The court affirmed the dismissal of appellants' prohibition complaint, holding respondent had jurisdiction to decide issues of privilege and had extensive jurisdiction over discovery, including inherent authority to impose sanctions for failure to comply with discovery orders. Appellants had an adequate remedy by appeal to resolve alleged errors by respondent.

LexisNexis(R) Headnotes

Civil Procedure > Appeals > General Overview
Governments > Courts > Rule Application & Interpretation
[HN1] Among the factors the appellate court considers in determining whether to grant oral argument under *Ohio Sup. Ct. Prac. R. IX(2)* are whether the case involves a matter of great importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals.

Civil Procedure > Pleading & Practice > Defenses, Demurrers & Objections > Failures to State Claims
Civil Procedure > Discovery > Disclosures > Sanctions
Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims
[HN2] Dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in relators' favor, it appears beyond doubt that they can prove no set of facts warranting relief.

Civil Procedure > Discovery > Protective Orders
Civil Procedure > Remedies > Writs > Common Law Writs > Prohibition
Criminal Law & Procedure > Discovery & Inspection > Discovery Misconduct > Sanctions > Disclosure & Inspection
[HN3] Trial courts have the requisite jurisdiction to decide issues of privilege; thus extraordinary relief in prohibition will not lie to correct any errors in decisions of these issues. Trial courts also have extensive jurisdiction over discovery, including inherent authority to direct an in camera inspection of alleged privileged materials and to impose sanctions for failure to comply with discovery orders, so a writ of prohibition will not generally issue to challenge these orders. In addition, the issue of whether there has been a sufficient factual showing of the crime-fraud exception to justify an in camera inspection is also for the trial court's determination.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview
Evidence > Privileges > Attorney-Client Privilege > Waiver
[HN4] Courts of appeals lack original jurisdiction over claims for declaratory judgment.

HEADNOTES

Prohibition to prevent common pleas court judge from enforcing any of his discovery orders in an asbestos litigation -- Dismissal of prohibition action pursuant to Civ.R. 12(B)(6) affirmed.

COUNSEL: Manley, Burke, Lipton & Cook and Andrew S. Lipton; Pratt & Singer Co., L.P.A., and Michael R. Thomas; [***8] Chester, Willcox & Saxbe, L.L.P., and J. Craig Wright, for appellants.

John F. Holcomb, Butler County Prosecuting Attorney, and Victoria Daiker, Assistant Prosecuting Attorney, for appellee.

Baker & Hostetler L.L.P. and Robin E. Harvey, urging affirmance for amici curiae, CBS Corp., f.k.a. Westinghouse Corp., Georgia Pacific Corp., and Uniroyal, Inc.

Baker & Hostetler L.L.P. and Wade Mitchell, urging affirmance for amicus curiae, Beazer East, Inc.

Barron, Peck & Bennie and Dave W. Peck, urging affirmance for amicus curiae, North American Refractories.

Israel, Wood & Puntil, P.C., and Chris Beck, urging affirmance for amicus curiae, General Refractories.

Willman & Arnold and Ruth Antinone, urging affirmance for amicus curiae, Combustion Engineering.

Regina M. Massetti, urging affirmance for amicus curiae, Ogelbay Norton Co.

Cash, Cash, Eagen & Kessel and Thomas L. Eagen, Jr., urging affirmance for amicus curiae, Mallenkrodt, Inc.

Benesch, Friedlander, Coplan & Aronoff and Frederic X. Shadley, urging affirmance for amicus curiae, AndCo., Inc.

Gallagher, Sharp, Fulton & Norman and Edward J. Cass, urging affirmance for amici curiae, George [***9] Reintjes and Janos Industrial Corp.

Thompson, Hine & Flory and Barbara J. Arison, urging affirmance for amicus curiae, Flintkote Co.

Bonezzi, Switzer, Murphy & Polido and Kevin O. Kadlec, urging affirmance for amicus curiae, ICF Kaiser Engineers.

Vorys, Sater, Seymour & Pease and Richard Schuster, urging affirmance for amicus curiae, ACandS, Inc.

Buckingham, Doolittle & Burroughs and Reginald S. Kramer, urging affirmance for amicus curiae, PPG Industries, Inc.

JUDGES: MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, COOK and LUNDBERG STRATTON, JJ., concur. PFEIFER, J., dissents and would reverse the judgment of the court of appeals.

OPINION

[*15] [**769] ***Per Curiam.***

Oral Argument

Appellants request oral argument for this appeal pursuant to *S. Ct.Prac.R. IX(2)*. [HN1] Among the factors we consider in determining whether to grant oral [*16] argument under *S. Ct.Prac.R. IX(2)* are whether the case involves a matter of great importance, complex issues of law or fact, a substantial constitutional issue, or a conflict between courts of appeals. *State ex rel. McGinty v. Cleveland City School Dist. Bd. of Edn. (1998), 81 Ohio St. 3d 283, 286, 690 N.E.2d 1273, 1276.*

Despite [***10] appellants' contentions to the contrary, oral argument is not warranted here. We recently decided a similar prohibition action challenging a trial court's rulings on privilege issues. *State ex rel. Herdman v. Watson (1998), 83 Ohio St. 3d 537, 700 N.E.2d 1270.* In addition, we have also recently addressed the crime-fraud exception to the attorney-client privilege. *State ex rel. Nix v. Cleveland (1998), 83 Ohio St. 3d 379, 700 N.E.2d 12.* None of the pertinent criteria requires oral argument here. The parties and *amici curiae*'s briefs are sufficient to resolve this appeal.

Based on the foregoing, we deny appellants' request for oral argument and proceed to determine the merits of their appeal based on the submitted briefs.

Merits

Appellants assert in their propositions of law that the court of appeals erred in dismissing their prohibition action. [HN2] Dismissal of a complaint for failure to state a claim upon which relief can be granted is appropriate if, after all factual allegations of the complaint are presumed true and all reasonable inferences are made in relators' favor, it appears beyond doubt that they can prove no set of facts warranting relief. *Clark v. Connor* [***11] *(1998), 82 Ohio St. 3d 309, 311, 695 N.E.2d 751, 754.* Appellants claim that dismissal was improper because Judge Elliott exercised unauthorized judicial power by ordering disclosure of privileged materials and issuing sanctions without first conducting an *in camera* inspection of the privileged matters. For the reasons that follow, however, appellants' claims lack merit, and the court of appeals properly dismissed their prohibition action.

First, as we have consistently held, "[HN3] trial courts have the requisite jurisdiction to decide issues of privilege; thus extraordinary relief in prohibition will not lie to correct any errors in decisions of these issues." *Herdman, 83 Ohio St. 3d at 538, 700 N.E.2d at 1271*; *State ex rel. Children's Med. Ctr. v. Brown (1991), 59 Ohio St. 3d 194, 196, 571 N.E.2d 724, 726*; *Rath v. Williamson (1992), 62 Ohio St. 3d 419, 583 N.E.2d 1308.* Trial courts also have extensive jurisdiction over discovery, including inherent authority to direct an *in camera* inspection of alleged privileged materials and to impose sanctions for failure to comply with discovery orders, so a writ of prohibition will not generally issue to challenge these orders. [***12] See *State ex rel. Grandview Hosp. & Med. Ctr. v. Gorman (1990), 51 Ohio St. 3d 94, 95-96, 554 N.E.2d 1297, 1299-1300*; see, also, *Nakoff v. Fairview Gen. Hosp. (1996), 75 Ohio St. 3d 254, 662 N.E.2d 1*, syllabus ("A trial court has broad discretion when imposing discovery [**770] sanctions."). In addition, the issue of whether [*17] there has been a sufficient factual showing of the crime-fraud exception to justify an *in camera* inspection is also for the trial court's determination. See, *e.g., Nix, 83 Ohio St. 3d at 383-384, 700 N.E.2d at 16-17.*

Second, absent a patent and unambiguous lack of jurisdiction on the part of Judge Elliott in issuing the challenged discovery orders, appellants have an adequate remedy by appeal to resolve any alleged error by Judge Elliott. *State ex rel. White v. Junkin (1997), 80 Ohio St. 3d 335, 338, 686 N.E.2d 267, 270.* In other words, an appeal from the discovery orders challenged by appellants provides an adequate legal remedy because if appellants are victorious on appeal, a new trial would remedy any

potential harm to them from Judge Elliott's orders. The attorney-client privilege invoked here is peculiarly related to the underlying asbestos litigation. [***13] In *Nelson v. Toledo Oxygen & Equip. Co. (1992), 63 Ohio St. 3d 385, 388-389, 588 N.E.2d 789, 791-792*, we similarly observed:

"Appellant is questioning the ability of an appellate court after final judgment to remedy an erroneous work-product disclosure. We believe, however, that he takes too narrow a view of an appellate court's ability to fashion appropriate relief. We can conceive of no circumstance, and appellant points to none, in which an appellate court could not fashion an appropriate remand order that would provide substantial relief from the erroneous disclosure of work-product materials. * * *

"In this regard, we distinguish appellant's work-product claim from claims of physician-patient and informant confidentiality * * * . Because the work-product exemption protects materials that are peculiarly related to litigation, any harm that might result from the disclosure of those materials will likewise be related to litigation. An appellate court review of such litigation will necessarily be able to provide relief from the erroneous disclosure of work-product materials."

Third, appeal following a final judgment is not rendered inadequate due to the time and expense involved. [***14] *State ex rel. Willacy v. Smith (1997), 78 Ohio St. 3d 47, 50, 676 N.E.2d 109, 112*. The large number of asbestos cases involved similarly does not establish inadequacy of the appellate remedy. Once the court of appeals resolves the propriety of the challenged discovery orders in the first appeal that raises these issues, it will necessarily resolve the issue for the other pending Butler County cases.

Fourth, any further discovery rulings by Judge Elliott or other trial court judges in the asbestos cases may be subject to immediate appeal under *R.C. 2505.02*, as amended effective July 22, 1998. *Herdman, 83 Ohio St. 3d at 539, 700 N.E.2d at 1272*. In fact, *amici curiae* defendants in the underlying asbestos litigation claim, and appellants do not dispute, that they have filed an appeal pursuant to amended *R.C. 2505.02* to address these same issues.

[*18] Fifth, the cases upon which appellants substantially rely, *State ex rel. Lambdin v. Brenton (1970), 21 Ohio St. 2d 21, 50 Ohio Op. 2d 44, 254 N.E.2d 681*, and *Peyko v. Frederick (1986), 25 Ohio St. 3d 164, 25 Ohio B. Rep. 207, 495 N.E.2d 918*, are inapposite. *Lambdin* involved an "extreme and legally questionable" trial court ruling concerning [***15] applicability of the physician-patient privilege and the attachment of prejudicial conditions that rendered the remedy of appeal inadequate. *Lambdin, 21 Ohio St. 2d at 24, 50 Ohio Op. 2d at 46, 254 N.E.2d at 683*. Here, as discussed previously, appeal provides an adequate legal remedy, and any harm imposed upon appellants is reparable. Judge Elliott additionally followed *Peyko* by ordering submission of claimed privileged materials to the court for an *in camera* inspection, and *Peyko* is not a prohibition case.

Sixth, to the extent that appellants claimed in their prohibition complaint that Texas court decisions concerning the deposition preparation document precluded Judge Elliott's discovery orders, *res judicata* is not a basis for prohibition because it does not divest a trial court of jurisdiction to decide its applicability and it can be raised adequately by postjudgment appeal. *State ex rel. Soukup v. Celebrezze (1998), 83 Ohio St. 3d 549, 550, 700 N.E.2d 1278, 1280.*

Finally, appellants improperly requested in their prohibition complaint a declaration [**771] that there was no evidence of a waiver of the attorney-client privilege or any evidence of fraud in their cases [***16] so as to require an *in camera* inspection of the privileged materials and testimony. [HN4] Courts of appeals lack original jurisdiction over claims for declaratory judgment. *State ex rel. Natl. Electri-*

cal Contractors Assn. v. Ohio Bur. of Emp. Serv. (1998), 83 Ohio St. 3d 179, 180, 699 N.E.2d 64, 66.

Based on the foregoing, the court of appeals properly dismissed appellants' prohibition action pursuant to *Civ.R. 12(B)(6)*. Accordingly, we affirm the judgment of the court of appeals.

Judgment affirmed.

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, COOK and LUNDBERG STRATTON, JJ., concur.

PFEIFER, J., dissents and would reverse the judgment of the court of appeals.

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Restrictions on Lawyers Communicating with Witnesses During Testimony: Law, Lore, Opinions, and the Rule

by Judge Tom Barber

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Witnesses are typically permitted to meet and communicate with lawyers before and after they testify. But a difficult situation may arise when a witness talks with a lawyer at some point *during* his or her testimony, that is, before all direct and cross examination has been completed. To many people inside and outside of the legal profession, this seems suspect or just plain wrong. Old fashioned common sense suggests that witness testimony is subject to being colored, coached, or even deliberately changed as a result of consultation with a lawyer, thereby impeding the search for truth.

Although this is a basic problem inherent in all witness testimony, and the issue comes up regularly in trials, hearings, depositions, and other proceedings, there is surprisingly little authority directly on point. When this issue presents itself, practitioners and judges alike may find themselves relying on lore, conventional wisdom, and strongly held opinions instead of law. The objective of this article is to identify and explain existing Florida law that may restrict lawyers from communicating with witnesses during their testimony and to suggest strategies for dealing with this issue when it arises in practice.

The Issue

The classic scenario arises when a witness who, while testifying on cross examination at a trial or hearing, speaks with the lawyer who called the witness to the stand on direct before the cross examination has been completed. This frequently happens during lunch breaks or other casual breaks between the direct and cross examinations. If a witness talks to the lawyer who called him or her to the stand before the cross examination has been completed, the cross examining lawyer may become quite irritated and claim that something illegal, improper, or unethical has occurred.

This same issue arises in a slightly different context during civil depositions. Some lawyers believe a deponent is not allowed to speak with his or her lawyer, even during breaks, until the deposing lawyer's questioning has been completed. Anyone who has ever represented a witness in a deposition knows that deponents almost always want to talk to a lawyer during breaks, if nothing else but to gain reassurance they are doing a good job. Commonly the witness will ask things like "How am I doing?" or "Did I answer that last question before the break correctly?" Sometimes witnesses even request breaks during depositions for the specific purpose of consulting with their lawyer. Upon returning from a deposition break, it is not unusual for a witness to be asked whether he or she spoke to his or her own lawyer during the break. When this comes up, lawyers may end up spending valuable time disagreeing about the propriety of the witness consulting with the lawyer during a break.

Although this issue arises regularly in both civil and criminal litigation, there are divergent viewpoints on what restrictions, if any, the law places on lawyers communicating with witnesses during their testimony. On one side of the spectrum, some believe that witnesses are automatically sequestered by virtue of being called to testify, and it is absolutely improper for a lawyer to talk to any witness about any subject until that witness' testimony has been concluded. Others believe it is permissible for lawyers to talk to witnesses about general matters while they are testifying, but not specifically about

their testimony. Some embrace a more nuanced view that it is permissible for a lawyer to talk to *a client* during the client's testimony, but it is improper for a lawyer to talk to a third-party witness. At the opposite end of the spectrum are those who believe a lawyer is permitted to talk to any witness about anything, including the witness' testimony, before, during, and after the witness has testified. Given the disparity of views, it is helpful to separate the law on this issue from lore, opinions, and conventional wisdom.

The Rule

In the American legal system, there are hundreds, if not thousands, of rules but one particular rule — the rule of witness sequestration — is so commonly used that it is known simply as "the rule." Even an inexperienced lawyer appearing in court for the first time usually knows to invoke the rule. The rule of witness sequestration, or exclusion of witnesses, came from common law but it is now codified in F.S. §90.616, which provides as follows:

(1) At the request of a party the court shall order, or upon its own motion the court may order, witnesses excluded from a proceeding so that they cannot hear the testimony of other witnesses except as provided in subsection (2).

(2) A witness may not be excluded if the witness is: (a) A party who is a natural person; (b) In a civil case, an officer or employee of a party that is not a natural person. The party's attorney shall designate the officer or employee who shall be the party's representative; (c) A person whose presence is shown by the party's attorney to be essential to the presentation of the party's cause; (d) In a criminal case, the victim of the crime, the victim's next of kin, the parent or guardian of a minor child victim, or a lawful representative of such person, unless, upon motion, the court determines such person's presence to be prejudicial. [a]

"The rule is designed to aid in ensuring a fair trial by avoiding the coloring of a witness' testimony by that which he has heard from other witnesses who have preceded him on the stand, thereby discouraging fabrication, inaccuracy and collusion."[2] However, many assume the rule also prevents lawyers from communicating with witnesses during their testimony. Thus, by invoking the rule, many believe they have done something that prevents an opposing lawyer from communicating with witnesses during their testimony.

The plain terms of the rule preclude a witness from sitting in a proceeding and listening to other witness testimony — it says nothing about witnesses communicating with lawyers. In addition, it has long been recognized that the rule also precludes witnesses from talking to each other outside of the courtroom about what happened in the courtroom; that is, witness A cannot tell witness B what questions were just asked and what answers were just given.[3] Similarly, the rule has been interpreted to preclude a sequestered witness from reviewing a daily transcript of the proceedings.[4]

Case law has also expanded the rule to include a prohibition on witnesses talking with certain nonwitness intermediaries about their testimony.[5] Obviously, the purpose of the rule would be defeated if an intermediary could sit in on the testimony and then relate what occurred in the courtroom to a sequestered witness. This intermediary concept is the basis for the argument that the rule prohibits lawyers from communicating with witnesses during their testimony. According to this argument, the trial lawyer is the ultimate intermediary.

Although there may be good theoretical and practical reasons for treating a trial lawyer as an intermediary for purposes of the rule, Florida case law interpreting the rule does not support this argument.[6] For example, in *Chamberlain v. State*, 881 So. 2d 1087 (Fla. 2004), a death penalty case, the defendant claimed the prosecutor violated the rule by speaking with a state witness, a Detective Fraser, during a break in his testimony.

Detective Fraser testified after defense counsel invoked the rule of sequestration. At the conclusion of his testimony, the court excused the jury, but asked Detective Fraser to remain in the courtroom during a bench conference. Thereafter, the prosecutor briefly discussed with Detective Fraser that he was going to be recalled to testify about a July 26, 1999, bond hearing in which Chamberlain was a witness. Defense counsel objected to Fraser being recalled on the grounds that the state had violated the rule by discussing with Fraser his potential testimony on recall during a break in the proceedings and while he was still under oath.[7]

The trial court overruled the defense objection based on the alleged violation of the rule. In affirming the trial court on this point, the Florida Supreme Court held:

The rule is designed to aid in ensuring a fair trial by avoiding the coloring of a witness's testimony by that which he has heard from other witnesses who have preceded him on the stand, thereby discouraging fabrication, inaccuracy and collusion. In this case there is no indication or allegation that Detective Fraser remained in the courtroom during the testimony of another witness, or that Detective Fraser discussed his testimony with another witness.[8]

Based on this passage from *Chamberlain*, it appears the Florida Supreme Court interprets the rule as prohibiting only two things: 1) witnesses remaining in the courtroom to hear the testimony of other witnesses; and 2) witnesses discussing their testimony among themselves prior to testifying. After reviewing the text of the rule itself, together with the existing Florida case law, it is clear that the rule does *not* prohibit lawyers from communicating with witnesses during their testimony. Those wishing to prevent opposing counsel from communicating with witnesses during their testimony must look elsewhere for support.

Rules Governing Mode and Order of Presentation of Evidence

Trial courts are given broad authority to control their proceedings under modern rules of procedure. Some have argued that these rules prohibit lawyers from communicating with witnesses during their testimony. One such rule, F.S. §90.612, provides in relevant part:

The judge shall exercise reasonable control over the mode and order of the interrogation of witnesses and the presentation of evidence, so as to: (a) facilitate, through effective interrogation and presentation, the discovery of the truth; (b) avoid needless consumption of time; (c) protect witnesses from harassment or undue embarrassment.

While this rule does not specifically prohibit lawyers from communicating with witnesses during their testimony, a reasonable argument certainly could be made that prohibiting lawyers from communicating with witnesses during their testimony would "facilitate . . . the discovery of the truth." Thus, this rule has been cited by at least one Florida court as support for an order prohibiting lawyers from communicating with witnesses during their testimony.[9]

The federal rules contain a similar provision, Fed. R. Evid. 611, which provides in relevant part:

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Federal courts also have cited this rule when confronted with general witness sequestration issues.[10]

However, the published federal opinions do not include any cases where a federal court has held that Rule 611 specifically prohibits lawyers from communicating with witnesses during their testimony.

It is clear that these rules grant trial courts broad authority to control their proceedings, and this authority may be relied upon by a trial court to prohibit lawyers from communicating with witnesses during their testimony. Nonetheless, they do not, by themselves, prohibit lawyers from communicating with witnesses during their testimony.

Rules of Professional Conduct

Regardless of what the rules of procedure may provide with respect to this issue, some believe it is flatly unethical for a lawyer to speak with a witness before the witness' testimony has been completed. Those who subscribe to this view believe that a lawyer who communicates with a witness during the witness' testimony has engaged in an unethical act regardless of what the lawyer and witness may have discussed. Lawyer coaching is, of course, the main concern.

Although no Florida rule of professional conduct specifically addresses witness coaching, it is recognized that the general rules prohibiting lawyers from facilitating untruthful testimony are broad enough to prohibit witness coaching.[11] Indeed, Florida courts have recognized the fact that lawyers are ethically prohibited from coaching witnesses.[12] The U.S. Supreme Court also has recognized the danger of unethical witness coaching which may occur if a lawyer is permitted to speak with a witness prior to completion of his or her testimony.[13]

Unfortunately, the ethical rules against witness coaching are of limited usefulness as a practical matter. There is general agreement that witness coaching is unethical, but there is considerable disagreement as to the definition of "coaching" as opposed to legitimate preparation.[14] It should not come as a surprise that the distinction between legitimate witness preparation and impermissible coaching is difficult to define. Even if there were an easy definition, it is difficult to prove that a lawyer coached a witness without getting into complex and time consuming attorney-client privilege issues.[15]

In any event, the ethical rules do *not* flatly prohibit all communication between lawyers and witnesses during the witness' testimony — only coaching is ethically prohibited.

Common Law Authority of Courts to Control Their Proceedings

Except for a brief mention in one federal court's local rules, there appears to be nothing in Florida law directly prohibiting lawyers from communicating with witnesses during their testimony.[16] This does not mean that lawyers and witnesses have a right to engage in this kind of communication or that trial courts are powerless to prohibit it. Rather, case law establishes that trial courts have common law authority to control their own proceedings and courts may use this authority to prohibit this practice.[17]

In *Geders v. U.S.*, 425 U.S. 80, 89 (1976), the trial judge sequestered all witnesses for both prosecution and defense and before each recess instructed testifying witnesses not to discuss their testimony with anyone, including the lawyers. The U.S. Supreme Court addressed whether this restriction could be applied to a criminal defendant in light of the Sixth Amendment right to counsel. The Court began with the general proposition that "[t]he judge's power to control the progress and, within the limits of the adversary system, the shape of the trial includes broad power to sequester witnesses before, during, and after their testimony."[18] After confirming the fact that trial courts have the inherent authority to prohibit lawyers from communicating with witnesses during their testimony, the Supreme Court then turned to the precise issue of whether this authority was restricted when the witness in question was a criminal defendant. The Court held that the trial court could not prohibit a criminal defendant from communicating with his or her lawyer in light of a defendant's Sixth

Amendment right to counsel. Thus, according to *Geders*, trial courts have the inherent common law authority to prohibit lawyers from communicating with witnesses during their testimony, as long as the witness is not the defendant.[19]

A review of Florida case law indicates that trial courts routinely restrict lawyers from communicating with witnesses during their testimony, usually between direct and cross examination.[20] In all of the reported Florida opinions, it was *assumed* that trial courts have the inherent authority to restrict lawyers from communicating with witnesses during their testimony; the typical issue on appeal is whether such an order may be applied to a criminal defendant, not whether the court had the authority to enter such an order in the first place. As such, there is little doubt that Florida trial courts have the inherent common law authority to prohibit lawyers from communicating with witnesses during their testimony, as long as the witness is not a criminal defendant.

Addressing Lawyer-Witness Communication During Testimony

Although trial courts have the inherent authority to prohibit lawyers from communicating with witnesses during their testimony, this prohibition does not automatically exist absent a court order. As previously noted, there is no rule of procedure specifically prohibiting this practice, so lawyers are free to do so as long as they do not engage in coaching. Therefore, if a litigant wishes to prohibit opposing counsel from communicating with a witness during his or her testimony, it is necessary for a trial judge to enter such an order.[21] Depending on the judge, an order of this nature might be entered sua sponte, but in most instances it will be necessary for counsel to request such an order on a case-by-case basis.

A trial court's decision on this point is a highly discretionary matter. There are no published opinions in Florida reversing a trial court for refusing to prohibit lawyers from communicating with witnesses (other than a criminal defendant) during their testimony.[22]

When seeking an order prohibiting lawyer-witness communications during the witness' testimony, counsel should be prepared to make arguments supporting their position and not simply assume the trial court will see things their way.[23] For some judges, it is obvious that lawyers should be prohibited from communicating with witnesses during their testimony. Other judges view things differently and may be reluctant to intervene.[24]

When a court has entered an order prohibiting lawyers from communicating with witnesses during their testimonies, failure of a witness, or a lawyer, to abide by it could subject one or both parties to sanctions including punishment for contempt or exclusion of such testimony at trial. But absent such an order from the trial court, there is nothing in Florida law prohibiting lawyers from communicating with witnesses during their testimony unless the communication constituted coaching.

The Criminal Defendant — A Special Situation

As noted earlier, the U.S. Supreme Court has held that a trial court's authority to prohibit communication between a criminal defendant and his or her counsel is extremely limited. The Florida Supreme Court has ruled to the same effect.[25] Because of the constitutional right to counsel, a criminal defendant is entitled to speak with his or her lawyer at almost any time during a trial. That said, a criminal defendant does not have the right to discuss his or her trial testimony with his or her lawyer while actually on the witness stand.[26] Thus, a criminal defendant does not have the constitutional right to force a break in proceedings to speak with his or her lawyer if the trial judge is not inclined to permit it.[27] But under Florida law, once a recess is called, no matter how brief, a defendant must have access to his or her attorney.[28] "[R]egardless of whether the recess is one hour, [30] minutes, or [10] minutes, to deny a defendant consultation with his attorney during any trial recess, even in the middle of his testimony, violates the defendant's basic right to counsel."[29]

When a Florida trial judge decides to enter an order restricting a lawyer from communicating with witnesses during testimony, the court must be careful to avoid applying such an order to a criminal defendant. If this should happen, a new trial may be warranted depending on the facts of the case.[30]

Conclusion

Many well-established reasons exist for prohibiting lawyers from communicating with witnesses during their testimony. In fact, the pragmatic, common sense appeal of such a prohibition is so strong that many in the legal community assume it exists without ever consulting the applicable rules and case law. But in the absence of an order from the trial judge, a lawyer is generally permitted to talk with a witness during testimony as long as the lawyer does not cross the line into unethical coaching.

This issue arises with regularity, especially in civil depositions, yet it does not lend itself to effective appellate review. As a result, there is insufficient case law on this important topic and lawyers are left to debate the issue back and forth with little hope for a definitive resolution. This combination of factors — a regular problem with little clarifying case law — suggests that a new rule of evidence or procedure would be useful to guide lawyers and judges as to the circumstances under which lawyers are prohibited from communicating with witnesses during their testimony. In the meantime, lawyers concerned about this issue must address the appropriateness of such a prohibition on a case-by-case basis with their trial judge. When doing so, it will be helpful to distinguish between law, lore, and personal opinions.

[1] In federal court "the rule" is codified in Fed. R. Evid. 616.

2 *Chamberlain v. State*, 881 So. 2d 1087, 1099-1100 (Fla. 2004); *Lott v. State*, 695 So. 2d 1239, 1243 (Fla. 1997). "The practice of sequestering witnesses has been used for centuries, and it came to the United States as part of our inheritance of the common law." *Hernandez v. State*, ___ So. 2d ___ 2009 WL 217972 (Fla. 2009). "Wigmore observed, '[t]here is perhaps no testimonial expedient which, with as long a history, has persisted in this manner without essential change.'" Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure, *Evidence* §6241 (2006); *Gov't of the Virgin Islands v. Edinborough*, 625 F.2d 472, 473 (3d Cir. 1980) (stating that the practice of sequestration dates to Biblical times).

[3] *See* Charles W. Ehrhardt, Florida Evidence §616.1 (2008) ("Although section 90.616 states that the court shall order witnesses excluded 'so that they cannot hear the testimony of other witnesses except as provided in subsection (2),' it seems clear that sequestration prohibits more than merely preventing a witness from hearing another person testify. Wigmore suggests that the process of sequestration also involves preventing the prospective witnesses from consulting each other and preventing them from consulting a witness who has left the witness stand.").

[4] *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365 (5th Cir. 1981) (sequestered expert violated the rule by reviewing daily transcript of proceedings; expert not allowed to testify).

[5] *See Del Monte Banana Co. v. Chacon*, 466 So. 2d 1167, 1170 (Fla. 3d D.C.A. 1985) (nonwitness "was present in courtroom, related the courtroom testimony to a sequestered witness").

[6] There are at least three published Florida opinions that either directly or implicitly reject the argument that the rule prohibits lawyers from communicating with witnesses during their testimony. *See, e.g., Chamberlain v. State*, 881 So. 2d 1087, 1099-1100 (Fla. 2004); *Nieves v. State*, 739 So. 2d 125 (Fla. 5th D.C.A. 1999); and *Kingery v. State*, 523 So. 2d 1199 (Fla. 1st D.C.A. 1988).

[7] *Chamberlain v. State*, 881 So. 2d at 1099 (Fla. 2004).

[8] *Id.* at 1099-1100 (internal quotations omitted).

[9] *See Kingery*, 523 So. 2d at 1205 ("Our reasoning on this point attempts to give due weight to the broad discretion accorded a trial court in the conduct of a trial. *See* §90.612, Fla. Stat.").

[10] *See In re U.S.*, 584 F.2d 666 (5th Cir. 1978) (Although federal agent involved in preparation of criminal proceedings could not be excluded from the courtroom, any prejudice from such agent's presence while others were testifying could be rectified by requiring the government to present the agent's substantive testimony at an early stage of its case; however, what the court could not do is bar the agent's subsequent testimony either in government's case in chief or on rebuttal because he was not sequestered.).

[11] The local rules for the Southern District of Florida specifically prohibit coaching witnesses in depositions. *See* S.D. Fla. L. R. 30.1(A)(1). The Florida Bar Trial Lawyers Section, Guidelines for Professional Conduct (2008 ed.), discusses coaching during depositions in section F-8: "While a question is pending, counsel should not coach the deponent nor suggest answers, through objections or otherwise." Witness coaching has contributed to the disbarment of at least one Florida lawyer. *See Florida Bd. of Bar Examiners Re: L.H.H.*, 660 So. 2d 1046 (Fla. 1995).

[12] *Thompson v. State*, 507 So. 2d 1074, 1075 (Fla. 1987) (discussing the fact that an attorney is not ethically permitted to coach a client during a break in the client's cross examination); *Leerdam v. State*, 891 So. 2d 1046, 1048 (Fla. 2d D.C.A. 2004) (permitting defense counsel to consult with a client during a break in his testimony "allows defense counsel to advise, calm, and reassure the defendant without violating the rule against coaching witnesses"); *Crutchfield v. Wainright*, 803 F.2d 1103, 1110 (11th Cir. 1986) (attempting to define coaching as "improperly directing a witness's testimony in such a way as to have it conform with, conflict with, or supplement the testimony of other witnesses"); *see also Cardona v. State*, 826 So. 2d 968 (Fla. 2002) ("When a particular witness is crucial to the [s]tate's case, evidence of coaching is especially material to that witness's credibility.").

[13] *Geders v. U.S.*, 425 U.S. 80, 89 (1976).

[14] For a general discussion of the ethical implication of witness coaching *see* Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardozo L. Rev. 1, 666 (1995); and Joseph D. Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 Geo. J. Legal Ethics 389 (1987).

[15] *Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297 (Fla. 5th D.C.A. 1996) ("We recognize that the coaching of witnesses during depositions may obstruct the fact-finding purpose of discovery. We also recognize a trial court's authority to supervise the conduct of parties at depositions, but that authority may not encroach upon the attorney-client privilege.").

[16] The only rule addressing this issue in Florida appears to be S.D. Fla. L. R. 30.1(A), which states, in relevant part, as follows: "The following abusive deposition conduct is prohibited: (2) Interrupting examination for an off-the-record conference between counsel and the witness except for the purpose of determining whether to assert a privilege."

[17] As Professor Ehrhardt notes, "[a] judge has the discretion to order a witness who is testifying not to talk with counsel during a recess in order to avoid counsel coaching the witness with respect to

subsequent examination." Ehrhardt, Florida Evidence §612.2 (2008). In *McDermott v. Miami-Dade County*, 753 So. 2d 729 (Fla. 3d D.C.A. 2000), a workers' compensation judge entered an order precluding a witness from communicating with her lawyer during a multi-day break in her deposition. The First District held that a provision of the workers' compensation statutes provided authority for the lower court's order.

[18] *Geders*, 425 U.S. 80, 89 (1976).

[19] It should be noted that the U.S. Supreme Court narrowed its holding in *Geders* 13 years later in *Perry v. Leeke*, 488 U.S. 272 (1989). In *Perry*, the court held that there was no violation of the defendant's Sixth Amendment right to counsel when he was precluded from talking to his lawyer during a 15-minute recess between his direct and cross examination. Nonetheless, Florida law, which contains a broader right to counsel, does not permit a trial court to impose the same restriction approved by the U.S. Supreme Court in *Perry*. *See* note 26 below.

[20] *See, e.g., Amos v. State*, 618 So. 2d 157 (Fla. 1993); *Thompson v. State*, 507 So. 2d 1074 (Fla. 1987); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F. Supp. 834 (S.D. Fla. 1987), *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988); *Leerdam v. State*, 891 So. 2d 1046 (Fla. 2d D.C.A. 2004); *Wallace v. State,* 851 So. 2d 216 (Fla. 3d D.C.A.), *review denied,* 860 So. 2d 980 (Fla. 2003), *cert. denied,* 540 U.S. 1187 (2004); *Cabreriza v. State*, 517 So. 2d 51 (Fla. 3d D.C.A. 1987); *McFadden v. State*, 424 So. 2d 918 (Fla. 4th D.C.A. 1982); *Recinos v. State,* 420 So. 2d 95 (Fla. 3d D.C.A. 1982); *Stripling v. State,* 349 So. 2d 187 (Fla. 3d D.C.A. 1977); *Crutchfield v. Wainright*, 803 F.2d 1103 (11th Cir. 1986).

[21] *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993), provides an interesting, and somewhat controversial, example of such an order relating to communications between an attorney and his client in a civil deposition. In *Hall* the trial judge placed severe restrictions on the client's ability to consult with his counsel during a deposition. It should be noted, however, that federal courts are not uniform in their approach to this issue; when asked to implement deposition restrictions similar to those in *Hall*, a Nevada federal court refused. *See In re Stratosphere Corp. Securities Litigation,* 182 F.R.D. 614, 621 (D.Nev.1998). A Florida case, *Haskell Co. v. Georgia Pacific Corp.*, 684 So. 2d 297 (Fla. 5th D.C.A. 1996), holds that communications between a client and counsel during a break in a civil deposition are protected by the attorney-client privilege, but it does not address the question of whether such communications may be restricted by the trial court.

[22] In other jurisdictions this issue has reached appellate courts in a civil context. In these jurisdictions, "courts have struggled to define if and when a court may prohibit contact between a testifying party and his counsel during [civil] trial[s]." *See* Cary, *Rambo Depositions Revisited: Controlling Attorney-Client Consultations During Depositions*, 19 Geo. J. Legal Ethics 367 (2006). Consequently, there are published opinions reversing trial courts that have prohibited lawyers from communicating with witnesses during their testimony and there are opinions affirming such orders. *Compare Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980) (reversing trial court's order prohibiting counsel from communicating with client during overnight recess in civil trial), *with Aiello v. City of Wilmington*, 623 F.2d 845, 858 (3d Cir. 1980) (affirming order by trial judge restricting communication between counsel and his client during client's cross examination in civil trial).

[23] As previously noted, federal trial courts are not uniform in their approach to this issue, at least with respect to restrictions on civil deposition communications. Florida trial courts are likely to approach this issue differently as well. Those advocating for restriction on communications between lawyers and witnesses will find good arguments for their position in *Hall v. Clifton Precision Inc.*, 150 F.R.D. 525, 531-532 (E.D. Pa. 1993). Those advocating against restriction on communications between lawyers

and witnesses will find good arguments for their position in *In re Stratosphere Corp. Securities Litigation,* 182 F.R.D. 614, 621 (D. Nev. 1998).

[24] *See, e.g., Kingery v. State*, 523 So. 2d 1199 (Fla. 1st D.C.A. 1988) (trial court refused a defense request for there to be no contact between the prosecutor and state witness over lunch break). Those who find no difficulty with lawyers communicating with witnesses during their testimony might point out that the *Florida Standard Jury Instructions (Criminal)* §3.10 specifically instructs that "[i]t is entirely proper for a lawyer to talk to a witness about what testimony the witness would give if called to the courtroom. The witness should not be discredited by talking to a lawyer about his or her testimony." On the other hand, this instruction may miss the mark because it says nothing about the propriety of such communication *during*, as opposed to *before*, the witness' testimony has begun. It is interesting to note that *Florida's Standard Jury Instructions for Civil Cases* does not include a comparable instruction.

[25] *Perry v. Leeke*, 488 U.S. 272 (1989); *Geders v. U.S.*, 425 U.S. 80 (1976); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F. Supp. 834 (S.D. Fla. 1987), *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988); *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1983).

[26] *Leerdam v. State*, 891 So. 2d 1046, 1048 (Fla. 2d D.C.A. 2004) ("Federal and Florida authorities agree that a defendant does not have the constitutional right to discuss his trial testimony with counsel while that testimony is in progress.").

[27] *Perry v. Leeke*, 488 U.S. 272 (1989); *Bova v. State*, 410 So. 2d 1343 (Fla. 1982), *habeas corpus granted*, 674 F.Supp. 834 (S.D. Fla. 1987), *judgment aff'd*, 858 F.2d 1539 (11th Cir. 1988) ("the trial court has complete discretion in the granting of and duration of trial recesses . . . however, once the court does in fact grant a recess, we find a criminal defendant must be allowed access to counsel.").

[28] *Amos v. State*, 618 So. 2d 157, 161 (Fla. 1993) ("[N]o matter how brief the recess, a defendant in a criminal process must have access to his [or her] attorney.").

[29] *Leerdam v. State*, 891 So. 2d 1046, 1049 (Fla. 2d D.C.A. 2004). It should be noted that Florida and federal law differ somewhat on this issue. The Florida Supreme Court has held that the Florida Constitution provides a broader right to counsel than the U.S. Constitution. *Id.* Thus, in a federal trial, unlike a Florida trial, a defendant *could* be precluded from speaking with his or her lawyer during a brief recess. *Compare Perry v. Leeke*, 488 U.S. 272 (1989) (no violation of defendant's Sixth Amendment right to counsel when defendant was precluded from talking to his lawyer during a 15-minute recess between his direct and cross examination), *with Geders v. U.S.*, 425 U.S. 80, 87 (1976) (defendant's Sixth Amendment right to counsel violated when defendant was precluded from talking to his lawyer during an overnight recess between his direct and cross examination).

[30] Florida appellate courts use a harmless error analysis to determine if a new trial is required in these situations. *Compare, e.g., Thompson v. State*, 507 So. 2d 1074 (Fla. 1987) (new trial granted where trial court prohibited defense counsel from communicating with client prior to cross examination), *with Leerdam v. State*, 891 So. 2d 1046 (Fla. 2d D.C.A. 2004) (new trial not warranted where trial court prohibited defense counsel from communicating with client prior to cross examination); and *Wallace v. State,* 851 So. 2d 216, 221 (Fla. 3d D.C.A. 2003), *review denied,* 860 So. 2d 980 (Fla. 2003), *cert. denied,* 540 U.S. 1187 (2004) (refusing to grant new trial when the record failed to suggest that the defendant, or counsel on the defendant's behalf, wished to confer during a mid-testimony recess in which consultation was prohibited); *Cabreriza v. State*, 517 So. 2d 51 (Fla. 3d D.C.A. 1987) (new trial not warranted).

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This column is submitted on behalf of the Trial Lawyers Section, Glenn Matthew Burton, chair, and D. Matthew Allen, editor.

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