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Find the balance in ethical witness preparation

By: Daniel I. Small February 19, 2015

Over the last several columns, we have looked at the ethics of witness preparation from the extreme perspective: the witness who lies, or plans to do so. But the tug of war between ethically representing our clients and protecting the integrity of the justice system is no less challenging under less dramatic circumstances.

Where is the line between preparation and improper coaching, and how do we help ourselves and our witnesses to find it?

The first part of the challenge is understanding what the witness expects to hear. We talked in an earlier column about the "perception gap." As Paul Simon sang, "Still, a man hears what he wants to hear and disregards the rest."

You cannot pretend that your witness is a blank slate that you can write on easily. If your witness expects that you will tell him to lie — to tell a story to help the case, to toe the company line, to sing from the same song sheet as everyone else, however it is imagined — then everything that you say or do not say will be heard through that distorted speaker. You are the one who must listen for and correct that distortion.

Thus, the witness must first understand that you are seeking the truth. It is, of course, not that easy. Our adversarial system is constructed on the premise, right or wrong, that the fact-finder best discovers the truth through hearing each side's version. As the ancient fablist Aesop said, "Every truth has two sides; it is well to look at both, before we commit ourselves to either." So we must work with our client to zealously push our side.

As former U.S. Supreme Court Chief Justice Warren E. 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).

Finding that line is the challenge. It would be easier, certainly, if we could just act with an abundance of caution, to stay as far away from those lines as possible. However, our obligations as advocates do not let us off so easy.

As professor William Hodes put it 15 years ago: "Legal ethics is hard. You must try to find the line between what is permitted and what is not, and then get as close to that line as you can without crossing over to the bad side. Anything less is less than zealous representation."

How do we develop a framework within which to consider the limits on preparation? Let me suggest one from another world: publishing and literature.

A relative of mine is a successful author. She creates wonderful works of fiction, from her own experience and imagination. Those creations then get translated into other languages for readers around the world.

Since I know little about languages, I had the notion that translating is a mechanical process; after all, we can go online to get words or phrases translated from a long list of languages.

However, when the material is more complex, more nuanced and more colloquial, the translator's task is very different. My relative receives a steady stream of correspondence from translators around the world, some of it quite funny, asking for help in understanding slang, sayings and other creative uses of language. How do you say "Hell's bells" in Japanese? What does the phrase mean and how/why is it being used here?

The translator's task is very different from the author's. The translator is not creating new material; he or she is taking the material and making it understandable in another language. That may require suggesting new phrasing when comparable words do not exist, new analogies or colloquialisms when the original would not be readily comprehensible, and/or various other changes. But the essential creation remains the same, just in a new language.

After observing this process for a while, it struck me that there are meaningful parallels to witness preparation. The American Heritage Dictionary defines "create" as "to cause to exist; bring into being." The witness is the author, the creator of the material. The witness, and at first only the witness, knows what he or she saw, heard or did.

On the other hand, the dictionary defines "translate" as "to express in another language systematically retaining the

original sense." So it is with witness preparation. The lawyer is the translator, helping the witness to communicate that material in a strange language, rhythm and environment, but the lawyer is not creating new material.

Thus, a lawyer is permitted to push and prepare the witness to provide truthful testimony that is favorable to the client, as long as the lawyer does not encourage the witness to create a different 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 his or her 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; and

8) practicing the witness's testimony and suggesting choice of words.

The key is to emphasize to the witness, right from the start, the importance of our Rule 3: "Tell the Truth." That is the principal guidance that the ethical rules give on this topic.

Disciplinary Rule 7-102(A) of the Model Code of Professional Responsibility states that a lawyer "shall not … participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false" and shall not "counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." The witness needs to clearly and unequivocally understand that counsel is seeking no less and no more than the truth.

With that essential foundation, effective witness preparation can and must go forward. The District of Columbia Bar in its Ethics Opinion No. 79 (1979), p. 139, stated: "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."

David Berg put it a little more bluntly in the Winter 1987 edition of "Preparing Witnesses": "It is probably unethical to fail to prepare a witness, and it is undoubtedly cruel to subject anyone to cross-examination without preparation."

No one ever said this was going to be easy.

Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of the American Bar Association's "Preparing Witnesses" (4th Edition, 2014). He can be contacted at dan.small@hklaw.com.

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