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Ethical witness preparations: the extreme case

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In few areas of the law are ethical issues so challenging and yet so inextricably linked with day-to-day practice as in witness preparation.

On the one hand, both the law and the practical realities make clear that, as various courts have found, "a lawyer has an ethical duty to prepare a witness." Christy v. Penn. Turnpike, 160 F.R.D. 51, 53 (E.D. Pa. 1995). On the other hand, witness preparation is widely suspect in the public and media, and often very difficult to do both effectively and ethically.

The ethical issues in witness preparation are too complex to fully address in this format, but as an overview of the issue in this five-part series we will look at:

1) The extreme case of perjured testimony in general

2) "The Four Horsemen of the Lying Witness Apocalypse"

3) The Massachusetts approach to perjured testimony

4) Preparation vs. improper coaching

5) Ethical conduct in the deposition room

The extreme case is that of the client who either plans to (or does) commit perjury. As the U.S. Supreme Court stated long ago, "All perjured relevant testimony is at war with justice, since it may produce a judgment not resting on truth." In Re Michael, 326 U.S. 224, 227 (1945).

The dilemma for counsel arises when the search for truth conflicts with our dual obligations to represent our client zealously and to carefully protect the attorney-client privilege. There is no simple way out.

However, we must first accept this issue as a reality. Some people have a tendency (perhaps wishful thinking) to dismiss the lying client issue as a TV fantasy or an academic exercise. Alas, it is neither. Trials are challenging, exhausting and stressful. Lawyers have to make quick difficult decisions under great pressure. Those challenges may not lead to good decisions.

Consider the case of In Re Attorney Discipline Matter, 98 F3d 1082 (8th Cir. 1996). The rough facts are simple: The trial was underway in a divorce case in which the custody of the young daughter was at issue. The husband's lawyer called a surprise witness, who testified that he had an affair with the wife which was consummated at a local motel. On some occasions, the wife was unable or unwilling to find babysitting so she brought her 18-month-old daughter with her and plunked her down on one bed in the motel room while she and her lover had sex on the other bed. Worse still, when the child got antsy, they gave her one of the bottles of beer they had brought with them, which seemed to keep her occupied.

The testimony concluded and a recess was called with the wife's lawyer no doubt wondering where the truck came from that just ran over the case he had worked so hard to prepare. Everyone left the courtroom, except the wife and her lawyer. How would each of us react to such devastating testimony? How would this lawyer? As it happens, the court reporter had a backup system in that courtroom: a tape recorder that was "inadvertently" left running during the recess. It captured the conversation between the wife and her lawyer, which included:

Attorney: What about the business about the [motel]? Did that happen?

Client: Yeah, it happened

Attorney: You better deny this. Eighteen months old, Jesus. You better deny this.

Client: What can I do with it, that won't make it seem like I'm lying?

Attorney: If you said it didn't happen, it didn't happen.

Having heard his client clearly admit that the lover's testimony was true, the lawyer called her to the stand, and with great outrage, asked:

Attorney: Under oath now, do you ever remember going to a motel with your daughter with [J.M.]?

Client: No.

Attorney: That's a lie, isn't it?

Client: Yes.

The tape eventually came out, the lawyer was disbarred and the 8th U.S. Circuit Court of Appeals upheld his disbarment. It would be tempting to dismiss the case as too extreme to consider, but that would be wrong. First, under the great pressures of a trial we hope that we would all be angels, know the right thing to do and do it. But we are humans, not angels, and can at least understand the shock that lawyer must have felt and the temptation to make it go away.

Second, we have to understand that we all tell clients to lie in ways far more subtle yet perhaps far more effective than "You better deny this": by not understanding their preconceptions about lawyers and what lawyers want (non-lawyers are far less shocked by the facts of that divorce case than lawyers are — that's what many of them expect); by not listening carefully enough to the client; by not appreciating that a matter that may be "just another case" to the lawyer may be one of the most significant and scary events in the client's life; or by not taking the time to help clients understand the case, the process and the rules.

So how are we to deal with the situation of the lying witness? It would be great if there was a simple answer. There is not. The competing obligations create a dilemma where there is no good answer — just an ongoing search for the best route to safety and truth. Clearly, "You better deny it" is not that route. In the next article we'll begin to explore some of the options.

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