

ETHICAL CONCERNS IN GROOMING THE CRIMINAL DEFENDANT FOR THE WITNESS STAND

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I. INTRODUCTION

In this age of reality television, when just about any area of endeavor is Monday-morning quarterbacked by talking heads of various levels of expertise and vitriol, the criminal trial remains a front contender, whether by virtue of celebrity or heinousness. From Phil Spector's wig to Scott Peterson's suit and return to natural hair color, the criminal defendant's appearance and demeanor at trial are the subject of scrutiny and debate in the media.¹ The media's attempt to turn this into "entertainment" belies the importance of the criminal defendant's appearance and comportment at trial to the trier of fact, whether that be judge or jury. And nowhere is the defendant's behavior more scrutinized than when he is on the witness stand. Consciously or not, the jury evaluates the defendant's demeanor on the stand and incorporates that assessment into its finding of "credibility." *How* a defendant delivers his testimony is often as crucial as *what* he testifies to. How does defense counsel go about preparing her client for the witness stand?

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1. See, e.g., William Booth, *Phil Spector's Trial Goes on Location*, WASH. POST, Aug. 10, 2007, at C1; Susan Estrich, Op-Ed., *TV Tryout: Scott Peterson Gets a Makeover*, S.F. CHRON., May 11, 2003, at D3.

II. PRACTICAL CONSIDERATIONS (OR, LEVELING THE PLAYING FIELD)

The practical aspect of preparing the criminal client for testimony of course springs from two basic sources: First, acknowledgement of the fact that, for the most part, the prosecution's witnesses have experience and training in courtroom behavior and testimonial communication skills. Most law enforcement officers receive training on how to testify. They have been given courses on how to sit, how to address counsel, and how to look at the jury when testifying.² This training is then supplemented by the sheer experience of doing it a number of times. They even receive what lawyers could call "continuing education in testifying"; that is, each time they testify they get comments on how well they did, or how they may have faltered, so that next time, their testimony is all that much better.

The prosecutor's forensic experts are even better than the police witnesses. These are people who generally have received a higher education, who have specialized training and who also have probably benefited from a course or two on how to effectively testify. Furthermore, as "experts," they get to enjoy special rules of evidence, which the average lay witness is not afforded.³

The combination of training and experience is finally galvanized by the patina which society bestows upon these witnesses: they are "law enforcement," or "experts" called by "the People." All of these factors help imbue the prosecution's witnesses with a certain confidence and ease in the courtroom; qualities which the trier of fact may consciously or subconsciously equate with credibility.

Contrast this with the defense, saddled with a client who has little or no prior experience as a witness, who may have very little formal

2. See, e.g., Lynette Holloway, *New York Police to Get Training In How to Testify*, N.Y. TIMES, Feb. 26, 1993, at B1.

3. See, e.g., FED. R. EVID. 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact at issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of rule 702.

See also FED. R. EVID. 702:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

education and so be barely able to articulate the facts of his testimony, or who, whether out of sheer terror of the circumstances he is in, or denial of the same, testifies in a halting or annoying manner. To the “objective” viewer, the trier of fact, the criminal defendant does not come across as well and so is not believed. Is it solely because the testimony is not to be believed? No. It is because the criminal defendant’s obvious discomfort and nervousness on the stand are perceived by the jury as indications of guilt. Or, conversely, the criminal defendant’s testimony comes across so smoothly and glibly that the jury again reads these traits as indications of guilt.

It is therefore incumbent upon defense counsel to try and level this playing field. How far can counsel go in “grooming” her client for testifying?

III. ETHICAL CONSIDERATIONS

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney’s questions and the witness’ answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, . . . and is to be commended because it promotes a more efficient administration of justice and saves court time.⁴

The difference between witness preparation and witness “coaching” is that the latter implies conduct by the lawyer which “*alters* a witness’s story about the events in question.”⁵ In *The Ethics of Witness Calling*, Professor Wydick assigns three grades to witness “coaching”: The first two involve a lawyer inducing the witness to testify to something the lawyer knows is *false*, either by overt or covert means.⁶ The third involves a lawyer not knowingly inducing a witness to testify falsely but altering the witness’s story by the very process of attempting to prepare the witness for testimony.⁷ To the extent the client’s story is *altered* by *any* of these means, it “interfere[s] with the court’s truth-seeking

4. State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979) (internal citation omitted).

5. Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 2 (1995) (emphasis added).

6. *Id.* at 3.

7. *Id.* at 4.

function.”⁸ However, ethical considerations are not the same for each of these three “grades.”

“[A]n attorney may not ‘counsel or assist a witness to testify *falsely*.’”⁹

Under the federal perjury statutes, a lawyer can be punished for suborning perjury if the following conditions are met: (a) the witness testified under oath or affirmation about a material matter; (b) the testimony was false; (c) the witness knew it was false; (d) the lawyer induced the witness to give the testimony; (e) the lawyer knew it was false; and (f) the lawyer knew that the witness knew it was false.¹⁰

If detected and proven, counsel may be prosecuted for the crime of subornation of perjury which further subjects him to disciplinary action since it constitutes an act of moral turpitude¹¹ and is considered direct contempt of court.¹²

Short of subornation of perjury, Rule 3.3 of the *Model Rules of Professional Conduct* specifically proscribes a lawyer from *offering* evidence she knows is false.¹³ The term “knows” means actual knowledge, but a lawyer’s actual knowledge can be inferred from the surrounding circumstances.¹⁴ The term “evidence” includes false testimony of a client or of a third person, falsified documents, and physical evidence that the lawyer knows is not what it is represented to be.¹⁵ Similarly, Model Rule 1.2(d) states that a lawyer must not counsel or assist a client “in conduct that the lawyer knows is criminal or fraudulent.”¹⁶

Model Rule 3.3 commands that a lawyer must not knowingly:

“(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; . . . [or]

8. *Id.* at 37.

9. *United States v. Rhynes*, 218 F.3d 310, 318 (4th Cir. 2000) (quoting MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (1995)) (emphasis added).

10. Wydick, *supra* note 5, at 18 n.48 (citation omitted).

11. *See* CAL. BUS. & PROF. CODE § 6101 (West 2003); *In re Jones*, 487 P.2d 1016, 1022 (1971); *see also, e.g.*, 40 A.L.R.3d 169 § 6(a) (Supp. 2007).

12. *See, e.g.*, *Vaughn v. Mun. Court of L.A. Judicial Dist.*, 60 Cal. Rptr. 575, 581 (Ct. App. 1967).

13. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2007).

14. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2007).

15. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmts. 3, 6 & 8 (2007).

16. MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2007).

(3) offer evidence that the lawyer knows to be false.”¹⁷

Comment 3 to Model Rule 3.1 states that “[t]he lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.”¹⁸

A. The Constitutional “Overrides”

The Sixth Amendment of the United States Constitution guarantees a criminal defendant “the Assistance of Counsel for his defence.”¹⁹ And, this “assistance” must be “effective.”²⁰ The Fifth and Fourteenth Amendments prohibit the Federal government and the states, respectively, from depriving any person “of life, liberty, or property, without due process of law.”²¹ Consequently, the right to counsel applies to the States,²² as does the right against self-incrimination.²³ Additionally, the Supreme Court has recognized other rights as corollary to, and emanating from, those granted by the Fifth and Sixth Amendments, including the right of a criminal defendant to testify in his own defense.²⁴ However, this does not bestow upon the defendant a constitutional right to testify *falsely*.²⁵

When the client invokes his right to take the stand, is defense counsel “effective” if she allows her client to take the stand in an unprepared state? This has nothing to do with counsel’s duty to conduct adequate investigation of the facts and law of the case,²⁶ but rather is more akin to rehabilitating the client in areas of weakness before the client even takes the stand.²⁷

17. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(1)-(3) (2007); *see also, e.g., In re Aguilar*, 97 P.3d 815, 819-20 (Cal. 2004).

18. MODEL RULES OF PROF’L CONDUCT R. 3.1 cmt. 3 (2007).

19. U.S. CONST. amend. VI.

20. *Strickland v. Washington*, 466 U.S. 668, 685-86 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)).

21. U.S. CONST., amend. V, XIV.

22. *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963).

23. *Malloy v. Hogan*, 378 U.S. 1, 3 (1964).

24. *Rock v. Arkansas*, 483 U.S. 44, 49 (1987); *Harris v. New York*, 401 U.S. 222, 225 (1971).

25. *Nix v. Whiteside*, 475 U.S. 157, 173-74 (1986).

26. MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 5 (2007).

27. *See, e.g., Patricia J. Kerrigan, Witness Preparation*, 30 TEX. TECH. L. REV. 1367, 1367-68 (1999).

B. *Effective Representation and Ethical "Grooming"*

Can defense counsel ethically "groom" his client for testimony? The result of such "grooming" is that, while it is the same individual giving the same recitation of facts, they are presented in a different way. Now, the client comes across as being more credible because, by using different words to describe the same events, his version is delivered in a much more powerful way. His appearance and deportment may allow him to be more favorably viewed by the jury. If defense counsel has the resources of time and money to allow for such preparation, isn't it in his client's best interest to try and balance out the effectiveness of his client's testimony *vis-à-vis* that of the prosecution's witnesses?

It is my contention that criminal defense counsel is mandated to prepare his client for testimony as vigorously as possible and that the only limitation thereto lies with the aforementioned proscription against presenting *false* evidence. Anything short of that simply does not interfere with the court's "truth-seeking function."²⁸

Any degree of witness preparation will, necessarily, "alter" it. Even a witness's unprompted retrieval of information from memory can be shaded "by the witness's own experiences, outlook, and perceived self-interest."²⁹ The very act of retrieving information from memory "alters" it; for example psychologists who have studied memory have found that when a person is asked to state all she remembers about an event she might only come up with forty-five percent of the details but she will be quite accurate about those details.³⁰ "Psychologists call that kind of remembering 'recall.'"³¹ If, instead, the witness is given a series of specific questions about the event,

[S]he might be able to answer sixty-five percent of the questions with confidence, but her accuracy rate would be lower. Psychologists call this kind of remembering "recognition." . . . A lawyer who needs both accuracy and details should therefore draw on both recall and recognition, and most psychologists recommend using recall first, then recognition.³²

Memory has been "altered," but it doesn't make it less "true." To paraphrase Shakespeare, truth is not truth which alters when it alteration

28. See *Rock*, 483 U.S. at 63 (Rehnquist, C.J., dissenting).

29. Wydick, *supra* note 5, at 9.

30. *Id.* at 42.

31. *Id.*

32. *Id.* (emphasis added).

finds.³³ Similarly, a client's inability to recall a fact does not place counsel in an unethical position because counsel "refreshes" the client's memory: "An attorney is bound by the testimony of his witnesses and there is nothing improper in refreshing their memories before they take the stand. Reviewing their testimony before trial makes for better direct examination, facilitates the trial and lessens the possibility of irrelevant and perhaps prejudicial interpolations."³⁴

Professor Monroe Freedman pointed out that ethical witness preparation can also encompass the situation where the witness *omits* a fact which can help his case.³⁵ The attorney does not fabricate a fact out of the blue, but rather raises the fact extracted from documents or previous conversation because it has *legal* bearing on the case.³⁶ The client, who may not be educated about the law, has no way of knowing that an item which he thought of little consequence was actually potentially beneficial to his defense. Isn't this precisely counsel's role, to shape the facts of the defendant's case around the law which best serves that client's defense?

Take, for example, a client who was being prepared for testimony in a vehicular homicide case which involved drinking. He tells his lawyer that, "I only had two drinks." This statement is substantiated by the credit card charge at the bar which defendant had visited earlier in the evening. So, counsel assumes defendant will testify he had two drinks. When asked on the stand, "How many drinks did you have?", the defendant replies without hesitation and in one continuous statement: "I only had two drinks, but they were doubles!" In this situation, the surprise suffered by counsel at trial is reminiscent of Mark Twain's quip that "the difference between the right word and the wrong word is the difference between the lightning bug and the lightning."³⁷ How does counsel avoid such lightning strikes in the future? Counsel, of course, can be guided by this surprise in future witness preparations by specifically asking the client whether or not the two drinks listed on the credit card charge were "doubles."

If the client informs counsel (either voluntarily or through specific questioning) during witness preparation that the two drinks he had were

33. William Shakespeare, Sonnet 116, in *THE SONNETS* 84 (G. Blakemore Evans ed., Cambridge Univ. Press 2006) ("[L]ove is not love Which alters when it alteration finds.')

34. *People v. McGuirk*, 245 N.E.2d 917, 922 (1969).

35. Michael Higgins, *Fine Line*, A.B.A. J., May 1998, at 52, 56.

36. *Id.*

37. RICHARD S. LOWRY, "LITTERY MAN": MARK TWAIN AND MODERN AUTHORSHIP 17 (1996).

“doubles,” can counsel ethically tell him not to testify to the fact that the drinks were doubles? I think the answer is “no” because this is, indeed, not presenting the true facts. But what if, in the same case, the defendant tells his lawyer that he only drinks bourbon because he loves the “smell and the rich brown body” of the drink. In preparing him for testimony, can counsel tell him to drop the reference to his love of the drink; is that ethical? My answer is “yes!” No dishonesty is presented to the jury. Given the defendant’s pronounced “love” of the drink, he might think everyone shares the same feeling; counsel’s informing him ahead of time that not only is this probably not the case, but also that it will create a detrimental impression on the jury, helps present the defendant in a more favorable light while also averting opening the door to the introduction of evidence on a collateral matter by the prosecution.

Another hypothetical case: A defendant in a murder case tells you he has an alibi for the time when the murder was committed. He tells you he was traveling across country to the opposite coast and so was not in town at the time of the murder. Counsel investigates this claim and finds out through airline ticket receipts that defendant’s claim appears valid, although some of the time elements are missing. Nevertheless, it appears overall to be credible and is probably defendant’s best defense. However, another problem arises—he is charged for another murder that has been joined in the same trial because of similarities in the execution of the murders.

The defendant tells you he stopped off in Texas to see a friend on his way and that this friend could come forward to alibi him. Counsel determines this friend is not a good witness and appears reluctant to testify for the defendant. Counsel learns the reason defendant stopped off to see this “friend” was to threaten the friend’s wife to accept a property settlement that his friend wanted her to take.

Counsel advises defendant not to volunteer in his testimony that he stopped off in Texas on his way back East. Counsel knows the prosecution does not know about the property settlement threats made in Texas. Counsel’s decision not to have the topic brought up through direct examination of the client does not change the historical fact of the defendant’s alibi; the defendant is not lying on the stand. Does this “grooming” violate any ethical standards?

[D]efense counsel has no comparable obligation [as that of the prosecutor] to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of

guilty . . . [d]efense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. . . . Our interest in not convicting the innocent permits counsel to put the . . . State's case in the worst possible light, regardless of what he thinks or knows to be the truth.³⁸

C. Implications of "Rehearsals"

With the proliferation of trial consultants, there is a concomitant increase in rehearsing the client's testimony.³⁹ While such "rehearsals" may, indeed, result in a defendant more comfortably and persuasively testifying on the witness stand, ethical issues also result.

First, there is the very real possibility that the defendant's demeanor veers to the other side of credibility by his appearing too slick, too glib, too rehearsed. Such a presentation may open up to the prosecution a line of questioning regarding defendant's "preparation." Of course, such preparation is protected by the attorney-client privilege,⁴⁰ but danger exists that the prosecution can improperly ask defendant a question about his trial preparation with his counsel. While the trial court may sustain defense counsel's objection to this question, the jury hears the implication of rehearsal and, from that, may make the leap to "fabrication."

Another implication from "rehearsing" the client which potentially arises in criminal cases is that, if the defendant is convicted, there is the possibility that he will later try to leverage the length of his sentence by "turning" on his counsel by insinuating that he was told by counsel not only "what" to say on the stand, but also to "lie."

Often times, during witness preparation, the client is videotaped so that he can also see how he appears while testifying.⁴¹ Any tapes existing from this exercise are, of course, protected from being turned over to the prosecution by both the attorney-client privilege and work product doctrine.⁴² However, to the extent they offer exculpatory evidence to any

38. *United States v. Wade*, 388 U.S. 218, 256-58 (1967) (White J., concurring in part and dissenting in part); *see also* ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 3-1.2 (3d ed. 1993).

39. *See, e.g.*, Nicole LeGrande & Kathleen E. Mierau, *Witness Preparation and the Trial Consulting Industry*, 17 *GEO. J. LEGAL ETHICS* 947, 960 (2004).

40. Higgins, *supra* note 35, at 54.

41. *See, e.g.*, Kerrigan, *supra* note 27, at 1372.

42. *See, e.g.*, *Hickman v. Taylor*, 329 U.S. 495, 511-12 (1947).

charge of suborning perjury, can they ethically be revealed by counsel in her own defense somewhere down the line?

IV. CONCLUSION

I strongly believe that the criminal defense lawyer's calling and constitutional mandate is to do everything within his power to prevent his client from being convicted. There is nothing to apologize for or back away from on that issue. The preparation of the criminal defendant client for testimony is one of the major areas that must be pursued in crafting the overall defense. Not to provide the very best of advice and counsel on this point leaves your client potentially weak and vulnerable, thereby failing to bring parity to the courtroom proceedings. When defense counsel works to ensure her client is put in the very best light while testifying, counsel is acting ethically and within constitutional requirements.

Ethical questions will continue to morph as criminal trials become more sophisticated, technological and accessible to the public. As lawyers and courts wrestle with ever-evolving standards, one constant remains firm: defense counsel's duty to his client. *This* actually is the outside perimeter beyond which no one can go when evaluating "ethical" conduct; while many gray areas may emerge up to that point, they must always, in the end, be measured against this wall. A wall erected by the Constitution and laws of this country and maintained by the same.