OUR LIPS ARE SEALED...
OR ARE THEY?

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The Black, the White, and Shades of Grey in Model Rule 1.6

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Confidentiality Hypothetical

• On January 31, Lawyer (L) meets with A and B to discuss representing them in personal injury claims arising out of an automobile accident that occurred on January 1.
• A was the driver and B was the passenger in a car that was hit from behind. Both went to an emergency room for treatment immediately after the accident, and both subsequently saw the same chiropractor for a series of treatments thereafter.
Confidentiality Hypothetical, Cont’d.

• A and B both describe to L how the accident happened and their injuries. They say they suffered from whiplash, and had daily heat treatments for three weeks.

• Each gives L copies of bills from the hospital and the chiropractor. On April 1, L submits those bills along with his attorney’s lien and a settlement demand to the insurance company for the driver of the other car.

Confidentiality Hypothetical, Cont’d.

• A few weeks later, B comes to see L alone. He explains that he was visited by an FBI agent who accused him of being part of a staged accident scam. B admits to L that the accident he had been in with A was in fact staged.

• B also tells L that the chiropractor is in on the scam, that he typically has his staff perform a few heat treatments on accident “victims” and that he then prepares bills for at least three times as many treatments.
Confidentiality Hypothetical, Cont’d.

• B acknowledges that the chiropractor bills he gave L on this accident were inflated. Worse yet, A and B have realized that the bills are dated January 30, just about a month after the accident, but they show treatments administered on 60 different days, without showing specific dates for the treatments.

• B tells L that he made no admissions to the FBI agent, but when the agent asked who B’s lawyer was, he gave him L’s name, and B expects that L will get a visit.

Confidentiality Hypothetical, Cont’d.

• B asks L to tell the agent that A and B actually met with L sometime in March so that they can claim that the chiropractor’s bills were actually issued in early March, but just show the wrong date.

• What, if any, information L learned in the first meeting is protected by the attorney-client privilege or otherwise confidential?
Ethical Duties

Model Rule 1.6: Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

1. to prevent reasonably certain death or substantial bodily harm;
2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
4. to secure legal advice about the lawyer's compliance with these Rules;
5. to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
6. to comply with other law or a court order.

Ethical Duties

• What about information L learned in the second meeting, with B?

• After the second meeting with B, what action can/must L take?

• Can he continue to represent A and/or B in pursuing damages for the accident?

• Can/should/must he take any action concerning the claim he has already submitted to the insurance company?
Ethical Duties

- What about information L learned in the second meeting, with B?
- After the second meeting with B, what action can/must L take?
- Can he continue to represent A and/or B in pursuing damages for the accident?
- Can/should/must he take any action concerning the claim he has already submitted to the insurance company?

Ethical Duties

- What advice should he give B?
- If the FBI agent does visit and he asks for copies of A and B’s medical bills, can L hand them over?
- What if L is served with a grand jury subpoena for any medical records A or B gave him?
- What can L say if the agent asks when L first met with A and B?
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Privacy Attorney
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‘Listen, do you want to know a secret?’ Keeping client confidences

Disciplinary decisions by the Supreme Court ordering serious sanctions may hold a certain fascination. But the vast majority of lawyers, who genuinely want to comply with ethical obligations, would do better to focus on minor misconduct cases. These are the ones that provide lessons for lawyers who would never dream of lying to a judge or invading client trust funds. Private reprimand cases styled Matter of Anonymous have the real nugget. The Supreme Court apparently thinks they do, else it would not go to the trouble of writing them. There have been three of them in two recent months. That’s a lot.

One of them, issued on Aug. 27, is a rich opinion highlighting several important aspects of the duty of confidentiality. Matter of Anonymous, 932 N.E.2d 671 (Ind. 2010). Our duty to keep client information confidential is sweeping. Rule of Professional Conduct 1.6(a). Our duty to keep former client information confidential is equally broad. Rule 1.9(c). There are exceptions common to both rules, but they don’t come into play all that often.

Keeping confidences

There is not an exception that allows us to talk about our clients in social settings. Of that, we did not need reminding. But let’s change the facts a bit, and all of a sudden it becomes pretty interesting. Lawyer and Acquaintance are acquainted – they have business connections, they have friends in common, but Lawyer doesn’t represent Acquaintance – yet. Acquaintance decides to share some sensitive and embarrassing information with Lawyer. For whatever reason, Acquaintance felt comfortable sharing the information with Lawyer. Later, Acquaintance contacts Lawyer to recommend someone to represent him in a family law matter triggered by the events to which the earlier disclosed sensitive information pertained. Lawyer refers him to another lawyer in her firm. Acquaintance hires the recommended lawyer.

We know as a general proposition that lawyers in a firm are, for the most part, treated as one lawyer. So the confidences of one lawyer’s clients are the confidences of all lawyers in the same firm. It would have to be that way, wouldn’t it? Otherwise, law firms could simply not function. Acquaintance has now become Client.

Loose lips ...

Flash forward. Lawyer and friends are out for dinner, one of whom is known to be friends with Acquaintance. By this time, Acquaintance’s legal matter has concluded, but for our purposes that doesn’t matter. Lawyers have a duty to protect former client confidences to the same extent as they must protect current client confidences. At dinner Lawyer says to dining companions: “Did you hear about Acquaintance? He and his wife are getting divorced and [insert sensitive and embarrassing information here].”

This would have been an easy case if Lawyer had learned the information from Acquaintance while he was a client or from her law partner who was representing Acquaintance. Had that been the case, I suspect the Supreme Court would not have thought we needed to know about this; but even more, I doubt the Court would have viewed a private reprimand as a suitable sanction for the offense.

Post hoc ergo propter hoc

But remember, Lawyer knew the information because Acquaintance shared it with her before he became a client of Lawyer’s firm and even before Acquaintance asked Lawyer for a referral. The information would never have been confidential had Acquaintance not asked Lawyer for a referral or hired Lawyer’s firm. Lawyers may be lousy friends when they gossip about their friends to others, but that doesn’t violate the Rules of Professional Conduct.

The key question in this case was: does the act of hiring a lawyer retroactively convert the lawyer’s preexisting knowledge about the client into confidential client information? The Supreme Court answered that question “yes,” if the information is related to the representation of the client. It pointed to the broad language of Rule 1.6(a) and explanatory Comment [3]: The duty of confidence attaches to “all information relating to the representation, whatever its source.” Knowing, as she did, that Acquaintance had become a firm client, Lawyer was now required to treat her preexisting knowledge about Acquaintance as confidential if it was, as here, related to the representation.

There are two additional aspects of the Court’s confidentiality analysis that bear mentioning. They are not necessarily obvious.

Sharing with others

First, Lawyer argued that because Acquaintance had chosen to share the same information with others it was

(continued on page 22)
not confidential. The Court said that doesn’t change anything: “The fact that a client may choose to confide to others information relating to the representation does not waive or negate the confidentiality protections of the Rules. ...”

Second, Lawyer argued that the fact that Acquaintance and his spouse were getting divorced was a matter of public record. Heck, the local newspaper had even publicized that fact in its listing of recent court filings. That still doesn’t matter. First off, the especially sensitive information was not a matter of public record. But, get this: as to the filing of the divorce, because it was “information relating to the representation,” it was confidential and Lawyer had no business talking about it out of school. “[T]he Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.” The rest of the townsfolk were free to gossip about it, but Acquaintance’s lawyer was not.

Former client confidences

In a footnote, the Court highlighted an oft-overlooked aspect of the rule concerning protection of former client confidences: they, too, can never be revealed unless there is an exception that would also justify revealing confidences of a current client. Confidences of former clients can be used, but not revealed, if the information has become generally known and if its use is not to the disadvantage of the former client. At first blush, that might seem odd. But think about it. If former client information has become “generally known” – not just technically in the public sphere – every lawyer in the world, except the lawyer for the former client, could use that information as a basis for assisting other clients. Of course, the ex-client’s lawyer can use generally known former client information only in ways that are not disadvantageous to the former client. Otherwise, the lawyer will have a former-client conflict of interest under Rule 1.9(a).

Confidentiality versus privilege

It is important not to confuse the ethical duty of confidentiality with the attorney-client privilege, which is an evidentiary doctrine. As we have seen, the establishment of an attorney-client relationship between Acquaintance and another lawyer in Lawyer’s firm made all the difference in whether that information was confidential client

(continued on page 24)
information. Not so with the privilege. There was no attorney-client relationship (or even a contemplated relationship) between Acquaintance and Lawyer at the time Acquaintance revealed his sensitive information to Lawyer. That is the defining factor in defeating the privileged nature of the conversation. A later-created attorney-client relationship will not reach back and imbue earlier conversations with a privileged character. So while the lawyer is bound by confidentiality not to voluntarily reveal that earlier conversation, the client could not successfully claim attorney-client privilege if a third party sought to discover the contents of that conversation.

Rabb Emison – an appreciation

Inveterate Res Gestae columnist Rabb Emison recently passed away. We lost a giant of our profession. He was a masterful writer and storyteller. He bridged the gap between an earlier, perhaps more genteel, era of law practice and the cutting edge of where our profession is heading. He rendered irrelevant the distinctions between big city and small town lawyers. He taught me that the core values of our profession are enduring values. The hackneyed words “civility” and “professionalism” took on real substance when applied to Rabb.

At the very beginning of the Rules of Professional Conduct are 13 short paragraphs of Preamble that talk about the role and function of lawyers in society. I hope you’ll take a moment to read them in Rabb’s memory. It will take only a minute or two. In doing so, you will be reading an apt description of our friend, Rabb Emison.
Preparing Fact Witnesses for Testimony

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June 19, 2013

Preparing fact witnesses to testify involves some flat ethics prohibitions, but a surprising amount of flexibility in seeking to avoid those prohibitions.

**ABA Model Rules**

The ABA Model Rules contain several general provisions that might govern a lawyer's witness preparation conduct.

**First**, some of these general provisions address what lawyers might do themselves.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.4(b).

By referring to "criminal" acts, this rule obviously incorporates various anti-perjury and witness tampering criminal statutes, the violation of which would surely "reflect adversely" on the lawyer's "honesty, trustworthiness or fitness" to practice law.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(c) (emphasis added). This rule is somewhat more vague than ABA Model Rule 8.4(b), because it does not incorporate the criminal statutes, but rather more generic requirements of honesty.
The ABA Model Rules also contain an often-criticized provision prohibiting a lawyer's conduct that is "prejudicial to the administration of justice." ABA Model Rule 8.4(d).

Second, in addition to prohibiting lawyers from themselves engaging in wrongdoing, the ABA Model Rules prohibit lawyers from helping their clients engage in general misconduct.

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (emphases added).

Two comments deal with this general rule.

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It
may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

ABA Model Rule 1.2 cmts. [9], [10] (emphases added).

**Third**, the ABA Model Ethics Rules also contain somewhat more focused provisions dealing with lawyers offering evidence.

Several of these provisions provide guidance to lawyers acting before they offer evidence.

The ABA Model Ethics Rules contain several provisions dealing with lawyers' involvement with evidence that the lawyer knows to be false.

Starting with the most general prohibition,

[a] lawyer shall not: . . . falsify evidence, counsel or assist a witness to testify falsely . . . .

ABA Model Rule 3.4(b). This provision prohibits a lawyer's direct involvement in evidence falsification, as well as the lawyer's advice or assistance to any witness (presumably a client or a non-client) to testify falsely.

ABA Model Rule 3.3 indicates that

[a] lawyer shall not knowingly: . . . offer evidence that the lawyer knows to be false . . . .

ABA Model Rule 3.3(a)(3) (emphases added). This prohibition applies to clients and non-clients.

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.

ABA Model Rule 3.3 cmt. [5].

Unlike ABA Model Rule 3.4(c), this provision contains a knowledge requirement.

The Ethics Rules' Terminology section contains the following definition:
“Knowingly,” "known,” or "knows” denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). Thus, the prohibition on lawyers offering evidence that the lawyer "knows" to be false requires actual knowledge -- although a disciplinary authority or court could show such actual knowledge without a lawyer's confession.

The ABA Model Rules contain a very useful comment, which provides additional guidance on this issue.

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphases added).

The ABA Model Rules also contain guidance for lawyers who do not "know" that evidence is false, but suspect that it is false.

In essence, the ABA Model Rules provide a safe harbor for lawyers who refuse to offer such evidence.

A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added).

This provision immunizes the lawyer from criticism under other ethics rules that require the lawyer to diligently represent the client. See ABA Model Rule 1.3.

The ABA Model Rules and every state's ethics rules contain very specific provisions describing a lawyer's responsibility if a client states an intent to commit fraud
in a tribunal, or admits to past fraud on a tribunal. Those deal mostly with issues of confidentiality (and how a lawyer's duty of confidentiality interacts with the lawyer's duty to the system).

**Restatement**

The Restatement (Third) of Law Governing Lawyers § 120 (2000) contains essentially the same provisions as the ABA Model Rules and most states' ethics rules.

(1) A lawyer may not:

(a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;

(b) knowingly make a false statement of fact to the tribunal;

(c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

(2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

(3) A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.


The Restatement provides a much more detailed and useful discussion than the ethics rules of lawyers' knowledge (and ignorance) that triggers various requirements.

The Restatement first discusses the standard for a lawyer's "knowledge."

A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document. . . . A lawyer should not conclude that
testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client’s own statements indicate to the lawyer that the testimony or other evidence is false.


The Restatement also addresses lawyers’ knowledge in its discussion of false testimony.

False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.


The Restatement also defines the type of wrongful evidence that a lawyer may not participate in offering.

A lawyer’s responsibility for false evidence extends to testimony or other evidence in aid of the lawyer’s client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer’s own client, another witness favorable to the lawyer’s client, or a witness whom the lawyer has substantially prepared to testify (see § 116(1)). A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff’s lawyer, aware that an adverse witness being examined by the defendant’s lawyer is giving false evidence favorable to the plaintiff, is not required to correct it (compare Comment e). However, the lawyer may not attempt to reinforce the false evidence, such as by arguing
to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence (see also Comment e).

Id. (emphasis added).

Interestingly, a lawyer may elicit false evidence for purposes other than assisting a client's case.

It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer's client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.


Illustration 4 indicates that a lawyer who settles a case after eliciting false testimony from a witness (not in furtherance of the lawyer's client's case) does not violate Restatement § 120 by failing to disclose the witness's false statement.

The Restatement emphasizes the lawyer's duty to work with clients or witnesses who intend to or who have offered false evidence.

Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment h).
In discussing reasonable remedial measures that the lawyer must take if such consultation has not been successful, the Restatement again offers much more detailed guidance than the ethics rules.

If the lawyer's client or the witness refuses to correct the false testimony (see Comment g), the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact. (Subsection (2)). Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence (see Comment g). If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal (see Comment k hereto). If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

The Restatement includes an explicit statement confirming that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Restatement (Third) of Law Governing Lawyers § 116(1) (2000).

Not surprisingly, the Restatement prohibits "[a]ttempting to induce a witness to testify falsely as to a material fact." Restatement (Third) of Law Governing Lawyers § 116 cmt. b (2000) (referring to Comment l of Section 120).

Interestingly, the Restatement does not require private lawyers to inform non-client witnesses of their Fifth Amendment rights. Restatement (Third) of Law Governing Lawyers § 106 cmt. c (2000) ("A lawyer other than a prosecutor . . . is not required to inform any nonclient witness or prospective witness of the right to invoke privileges against answering, including the privilege against self-incrimination.").
The Restatement also contains an interesting discussion of actions that lawyers generally may take in preparing witnesses to testify.

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact (see §120(1)(a)).

Id. § 116 cmt. b (emphases added).

**Legal Ethics Opinions**

Legal ethics opinions provide some guidance to lawyers preparing witnesses for testimony.

For instance, the D.C. Bar dealt with these issues in D.C. LEO 79. Interestingly, the D.C. Bar indicated that

[i]t 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.

D.C. LEO 79 (12/18/79). The case law and other authorities belie this statement.
The D.C. Bar indicated, among other things, that lawyers may suggest specific wording of testimony to their clients, as long as the substance remains the client's truthful statement.

[T]he 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.

Id. (emphasis added). The D.C. Bar also dealt with the propriety of a lawyer's suggestion that the client include information from other sources.

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.

Id. (emphasis added). Finally, the D.C. Bar indicated that a lawyer failing to prepare a witness for testimony may not have been sufficiently diligent.

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.

Id. (emphasis added). In reaching these conclusions, the D.C. Bar repeatedly emphasized the curative nature of cross examination. Id.

In 1994, the Nassau County (New York) Bar Association held that the New York Ethics Code (which generally follows the old ABA Model Code rather than the new ABA Model Rules) permits a lawyer to make the following statement "[p]rior to discussing the case" with his client -- "as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence." Nassau County (New York) LEO 94-6 (2/16/94).

Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.

Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping -- you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

Id. (emphasis added). Accord Nassau County (New York) LEO 91-23 (9/25/91), [1991-1995 Ethics Ops.] ABA/BNA Law. Manual on Prof. Conduct 1001:6253 (holding that a lawyer "may inform a prospective client of relevant law regarding issues of a case before listening to the client's statement").
Other Authorities

There are surprisingly few articles dealing with the ethical limits of witness preparation.

Perhaps the most often-cited article is Joseph D. Piorkowski, Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching", 1 Geo. J. Legal Ethics 389 (1987-1988). This article cites an earlier treatise which described what the article calls the "primary objectives" of witness preparation.

One treatise on witness preparation specifies thirteen primary objectives for this procedure: "help the witness tell the truth; make sure the witness includes all the relevant facts; eliminate the irrelevant facts; organize the facts in a credible and understandable sequence; permit the attorney to compare the witness' story with the client's story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make [sure] the witness understands the importance of his or her testimony; teach the witness to fight anxiety, and particularly to defend him or herself during cross-examination." Although some of these goals are directed at enhancing attorney effectiveness, the overwhelming focus of the procedure is to ensure that the witness testifies truthfully, accurately, concisely, and convincingly.

Id. at 390-91 (footnotes omitted). Elsewhere, the article provides a list of safe instructions that lawyers may give their clients about to testify.

Aron and Rosner [authors of an earlier treatise] recommend that the attorney advise the witness to answer truthfully, to maintain neutrality, to only answer the question asked, to give only the best present recollection, to refrain from volunteering information, to testify only from personal knowledge, to use everyday language, to testify spontaneously, to avoid memorization, to pause before
answering, to admit to lack of knowledge where appropriate, and to clarify any unclear questions.

Id. at 391 n.9.

The Georgetown article discusses a number of areas it describes as "gray." For instance, the article discusses testifying witness's use of specific words. The article suggests such "safe" recommendations as avoiding phrases such as "to tell the truth," or "I think I saw." Id. at 399. The article also indicates that lawyers may safely advise their testifying clients to "avoid technical jargon or colloquial expressions," or the use of "sophisticated, 'formal' speech." Id. at 400. Lawyers may also tell their witnesses to avoid pejorative or offensive phrases to refer to certain people.

However, the article warns that lawyers may not change the substance of a witness’s statement.

The attorney's recommendation that the witness modify his intended meaning is clearly prohibited conduct. The most difficult issue, therefore, involves whether an attorney can encourage the substitution of words that do not change the witness' intended meaning, but that modify the potential emotional impact associated with the witness' original choice of words.

Id. (emphasis in original). Because of this risk, "[a]ttorneys should exercise the utmost caution . . . in recommending changes in word choice to a witness." Id. at 402.

The article also discusses a lawyer's suggestions about a testifying client's demeanor. Most lawyers would find such suggestions acceptable, but the article warns that there are limits.

It is at least arguable that when an attorney encourages a witness to appear confident, and during testimony the witness displays a sense of confidence while making an assertion about which he is not in fact confident, the attorney has encouraged the witness to testify "falsely" or to engage in "misrepresentation." For example, suppose
a witness in a criminal case is fifty-one percent certain that the defendant was the perpetrator of a given crime. If the prosecutor's statement to the witness to "appear confident" results in the jury perceiving a ninety percent certainty, then the outcome of the litigation may well be altered.

Id. at 404-05 (emphases added). The article generally finds acceptable a lawyer's suggestions about what the client should wear, or what mannerisms the client should use while testifying.

This class of conduct is best illustrated by the use of polite mannerisms and speech or by wearing a suit to court. This behavior is usually intended to convey the message that the witness is a fine, upstanding citizen who would never dream of lying in a court of law. Due to the very general nature of the message, it would be difficult to construe components of demeanor in this category as capable of being falsified or misrepresented.

Id. at 406.

The article also warns of the possible risk in another type of lawyer suggestion about a testifying witness's demeanor.

The last category -- conduct intended to communicate a specific message -- is capable of being false, misrepresentative, or deceitful. Components of demeanor in this class include vocal inflections, emphasis on certain words or phrases, and gestures. Moreover, behavior such as the appearance of surprise or display of emotion may fall within this class to the extent that such conduct is premeditated or feigned. Some aspects of demeanor within this category, such as gestures, clearly cannot be falsified. However, other forms of demeanor intended to convey a specific message may provide a basis for disciplinary liability if a witness were coached to use this demeanor to mislead a jury.

Id. at 406-07 (emphases added).
Case Law

There is also surprisingly little case law providing guidance to lawyers preparing witnesses for testimony.

The United States Supreme Court has provided the absolutely true but remarkably unhelpful directive that

[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.


As would be expected, courts have dealt severely with lawyers who persuade witnesses to testify falsely. See, e.g., In re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (disbarring a lawyer from practicing in federal court after he was disbarred from Missouri state courts for having arranged for a witness's false testimony);
In re Oberhellmann, 873 S.W.2d 851 (Mo. 1994) (disbarring a lawyer who arranged for a client's false testimony).

Maryland's highest court provided useful guidance.

Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call. The process of preparing a witness for trial, sometimes referred to as "horse shedding the witness," takes many forms, and involves matters ranging from recommended attire to a review of the facts known by the witness. Because the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern, attorneys are well advised to heed the sage advice of the Supreme Court of Rhode Island: "[I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to
resist the temptation to influence or bias the testimony of the witnesses."

It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be. In some instances, as in the case of an expert witness who will be asked to express an opinion based upon facts related by others, and who is not a factual witness whose testimony could be influenced by reading what others have said under oath, there is little danger in having the witness review the depositions of others. When, however, the testimony in the deposition bears directly on the facts that the reviewing witness will be asked to recount, and particularly when, as here, the testimony is known by the witness to be exactly that which will be used at trial, and is presented in its most graphic form by videotape, the potential for influencing the reviewing witness is great.

State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990) (footnote omitted).

One well-publicized incident provides an interesting insight into how far lawyers may go when preparing witnesses.

In August, 1997, a lawyer from the asbestos plaintiff's firm of Baron & Budd turned over a witness preparation memorandum that the firm used when preparing its asbestos clients to testify. According to an ABA/BNA article about witness preparation, the Baron & Budd memorandum contained the following statements.

How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.

... 

Remember to say you saw the NAMES on the BAGS.

...
The more often you were around it, the better for your case. You MUST prove that you breathed the dust while insulating cement was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

. . .

It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it.

. . .

It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.

. . .

You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still "NO"!

. . .

Do NOT mention product names that were not listed on your Work History Sheets.

. . .

Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another . . . . Be CONFIDENT that you saw just as much of one brand as all the others.

. . .

Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff.

. . .
You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!

... 

If there is a MISTAKE on your Work History Sheets, explain that the "girl from Baron & Budd" must have misunderstood what you told her when she wrote it down.


As of the date of that special report (February, 1998), the Texas Bar had already dismissed allegations of wrongdoing by Baron & Budd, and no court had yet found anything improper in the memorandum (the ABA/BNA article mentions that Baron & Budd took the position that it also provided its witnesses another memorandum advising the witnesses to tell the truth when they testify, ameliorating the impact of the absence of such a specific instruction in the witness memorandum itself).

According to the ABA/BNA article, several national ethics experts disagree about the ethical propriety of the memorandum.

Interestingly, then-Professor William Hodes of Indiana University School of Law - Indianapolis (then and now a noted ethics expert) acted as a consultant for Baron & Budd. According to Hodes, the memorandum "did not violate legal ethics rules." Id. at 51. As paraphrased in the ABA/BNA article, Hodes explained that "[u]nless there is inconsistency with independently established facts, or a radical departure from a client's unequivocal prior statements, a lawyer is obligated to give the client the benefit of the doubt." Id.
Later case law does not indicate any sanctions imposed on Baron & Budd, which means that the law firm apparently avoided all ethical or court-driven punishment or criticism.

More recently, Mitsubishi Motor Manufacturing criticized a letter distributed by the EEOC to Mitsubishi employees. The EEOC letter contained what it called "a short list of 'memory joggers' that we suggest that you begin thinking about." Id. at 52 (Excerpts from EEOC Letters). The ABA/BNA article recites these "memory joggers," which include particular phrases, comments, actions that the plaintiffs might have experienced at Mitsubishi. Although well-known Professor Ronald Rotunda (then at the University of Illinois) provided an affidavit in support of Mitsubishi’s motion for sanctions, a federal judge denied the motion. Id. at 51.

Conclusion

Given the surprising amount of flexibility in the ethics rules and the case law, most lawyers would not even come close to an ethics violation when preparing fact witnesses to testify. Instead, their litigation instinct will deter them from "over coaching" witnesses, because lawyers realize that such witnesses normally will not survive a vigorous cross-examination.