

The Ethical Duties of a Government Lawyer



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My Ethics Mentors





The Most Important Decision You Can
Make Right Now is What You Stand For:
Goodness . . . or Badness.



I Want to Be Good.

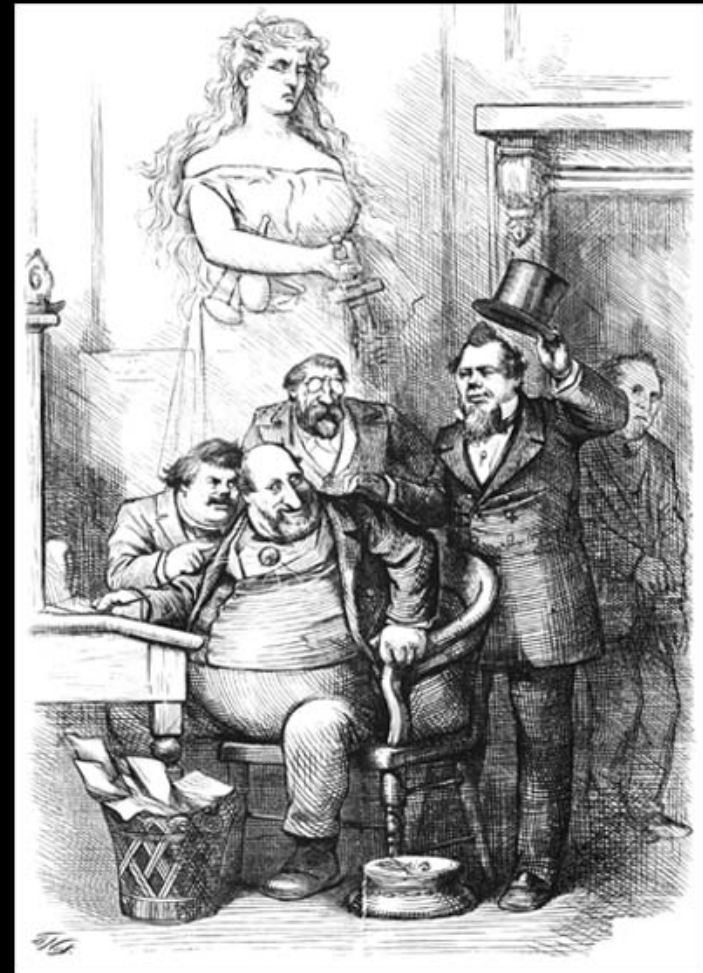


Three Obvious Ethical Issues for Government Lawyers

1. Ex Parte-ing Judges You Know

You're the home court lawyer.
The judge wants to know what's
going on with the case.

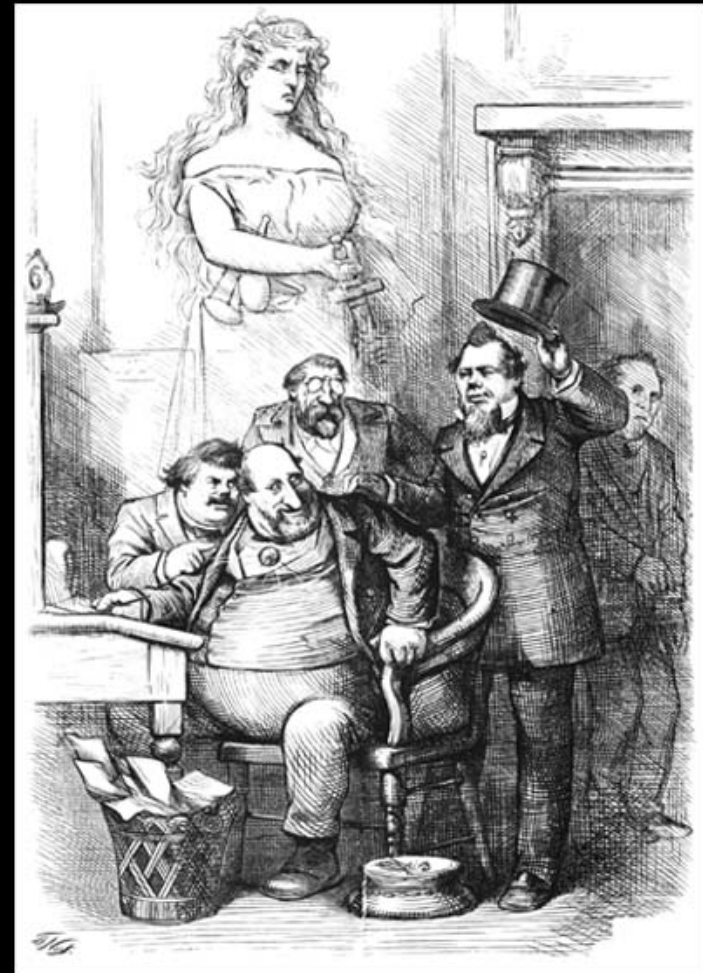
Rule 3.05: *A lawyer shall not except as permitted by law and not prohibited by applicable rules of practice or procedure communicate ex parte with a tribunal for the purpose of influencing that entity or person concerning a pending matter . . .*



1. Ex Parte-ing Judges You Know

Rule 3.05 extends to court staff as well.

Practice Tip: Apply the **Golden Rule.**



2. Communicating with Represented Parties

You have made a good offer to the plaintiff, but you think the plaintiff's attorney is not communicating your offer to his client.

So . . . you cc: the plaintiff in a letter detailing the offer to the plaintiff's lawyer to ensure that the plaintiff knows what has been offered.

Right or wrong?



2. Communicating with Represented Parties

Wrong.

Rule 4.02: In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.



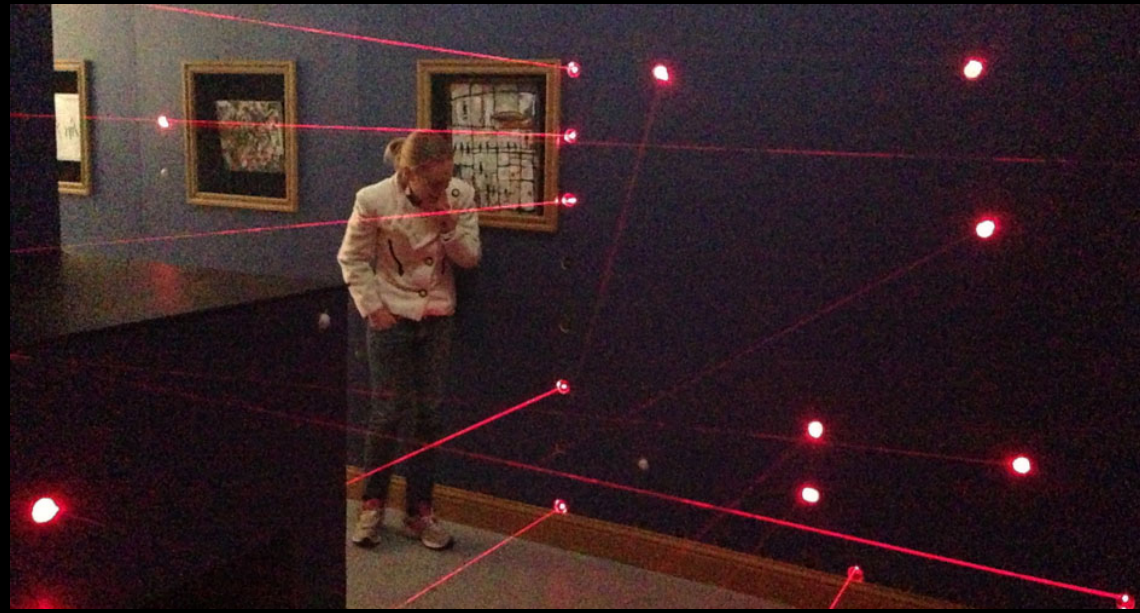
3. Revolving Door Issues

How do we deal with lawyers coming from and going to other jobs?



Comment 3, Rule 1.10

[R]ules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards.



First, don't stay on conflicted cases

Rule 1.09(a)(3): *Without prior consent, a lawyer who personally has represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . if it is the same or a substantially related matter.*



First, don't stay on conflicted cases

Comment 4B: *The “substantially related” aspect ... primarily involves situations where a lawyer could have acquired **confidential information concerning a prior client that could be used either to that client's disadvantage or for the disadvantage of current client or some other person.***



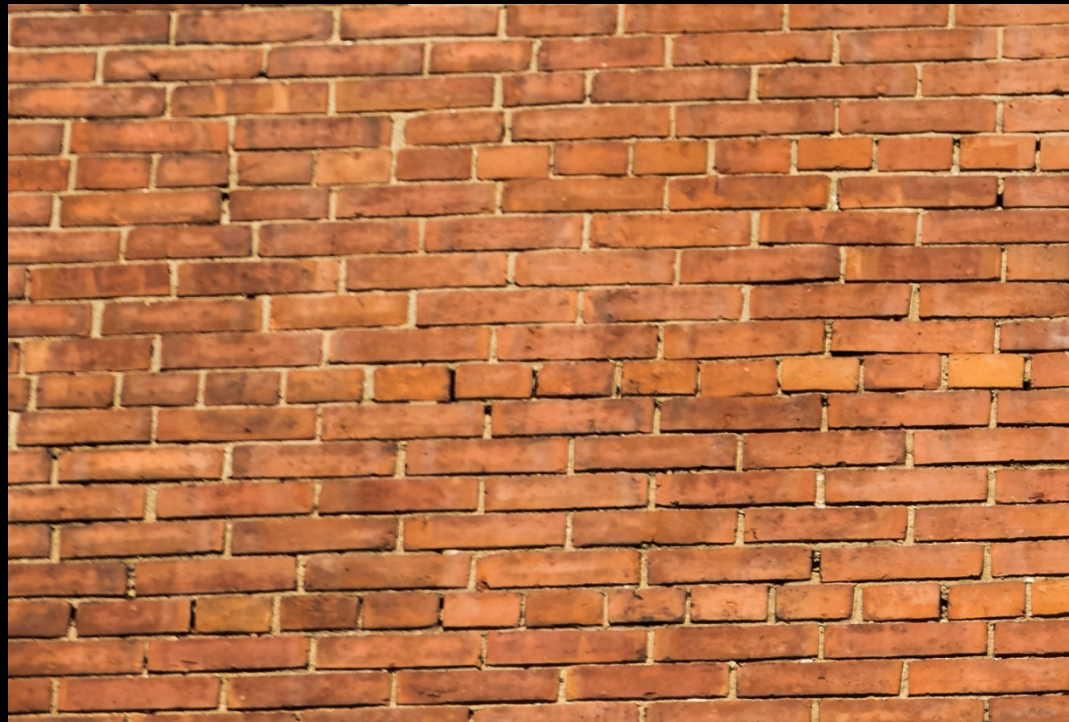
First, don't stay on conflicted cases

Rule 1.10(e)(1): *A lawyer serving as a public officer or employee shall not participate in a matter involving a private client when the lawyer had represented that client in the same matter while in private practice.*



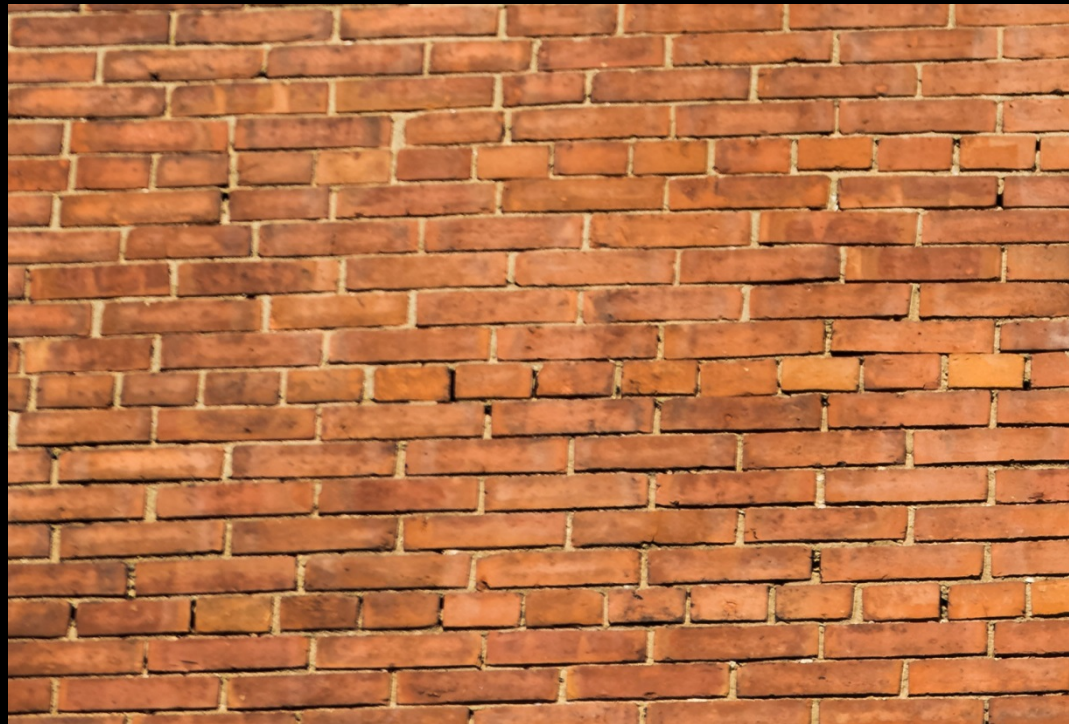
Second, wall off your conflicted lawyers

Comment 9: Rule 1.10(e)(1) **does not disqualify other lawyers in the agency with which the lawyer in question has become associated.** Although the rule does not require that the lawyer in question be screened from participation in the matter, **the sound practice would be to screen the lawyer to the extent feasible.**



Second, wall off your conflicted lawyers

Rule 1.11(c): If you hire a judge or law clerk, he or she must be “**screened from participation**” in any matter and **written notice must be promptly given** in any matter “in which the lawyer has passed upon the merits or otherwise participated personally and substantially as a adjudicatory official or law clerk.”



Third, hold your former employees to
their duty of loyalty

Rule 1.10(a): *Except as law may otherwise expressly permit, a lawyer shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.*



Third, hold your former employees to
their duty of loyalty

Rule 1.10(b): *Except as law may otherwise expressly permit, a lawyer having information that the lawyer knows or should know is confidential government information about a person or other legal entity acquired when the lawyer was a public officer or employee may not represent a private client whose interests are adverse . . .*



Two Ethical Issues Government
Lawyers Don't Think a Lot About

1. Incompetent Baby Lawyers

How do lawyers learn to do their jobs without running afoul of Rule 1.01?

A lawyer shall not accept or continue employment in a legal matter which the lawyer knows or should know is beyond the lawyer's competence

UNLESS



1. Incompetent Baby Lawyers

How do lawyers learn to do their jobs without running afoul of Rule 1.01?

Another lawyer who is competent to handle the matter is, with the prior informed consent of the client, associated in the matter.



1. Incompetent Baby Lawyers

Liability of the Supervised Lawyer (Rule 5.02):

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except . . .



1. Incompetent Baby Lawyers

Liability of the Supervised Lawyer (Rule 5.02):

Comment 1: *Rule 5.02 embodies the fundamental concept that every lawyer is a trained, mature, licensed professional who has sworn to uphold ethical standards and who is responsible for the lawyer's own conduct.*



1. Incompetent Baby Lawyers

Liability of the Supervised Lawyer (Rule 5.02):

A lawyer is bound by these rules notwithstanding that the lawyer acted under the supervision of another person, except . . .

a supervised lawyer does not violate these rules if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional conduct.



1. Incompetent Baby Lawyers

Liability of the Supervised Lawyer (Rule 5.02):

Comment 3: A “resolution of an arguable question of professional conduct” is reasonable, **even if ultimately found to be officially unacceptable**, provided it would have appeared reasonable to a disinterested, competent lawyer based on the information reasonably available to the supervising lawyer at the time the resolution was made.



1. Incompetent Baby Lawyers

Liability of the Supervising Lawyer (Rule 5.01):

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(a) the lawyer is a . . . supervising lawyer and orders, encourages, or knowingly permits the conduct involved.



1. Incompetent Baby Lawyers

Liability of the Supervising Lawyer (Rule 5.01):

A lawyer shall be subject to discipline because of another lawyer's violation of these rules of professional conduct if:

(b) the lawyer . . . has *direct supervisory authority over the other lawyer*, and with knowledge of the other lawyer's violation of these rules *knowingly fails to take reasonable remedial action to avoid or mitigate the consequences of the other lawyer's violation.*



1. Incompetent Baby Lawyers

Good Advice:

- (1) Know what your baby lawyers are doing.
- (2) Distinguish between their *constructive* mistakes and *damaging* mistakes. Focus on the impact of the mistake on the interests of your clients and third parties.
- (3) Ignore the damaging mistakes at your own peril.
Take corrective measures immediately.

2. Woodshedding

How do you prepare your witnesses ethically?



Woodshedding

- According to *New York Times* columnist and language savant William Safire, “woodshed” entered the lexicon in 1844 to “describe a place to put odds and ends,” used mainly by people who had moved from farm to city and no longer had a barn in back.



Woodshedding

- In 1907, it became a place of punishment, where, according to Safire, “Paw could whop the errant son with Maw out of earshot.”



Woodshedding

- It also was a place of privacy, where kids could steal corn-silk smokes.



Woodshedding

- In jazz terms, “woodshedding” is rehearsing alone.



Horseshedding Witnesses

- Originated by James Fenimore Cooper in reference to attorneys who lingered in carriage sheds near the old courthouse in White Plains, New York, to rehearse their witnesses.



Why Do We Call it
Woodshedding?

Because It Describes the Essence of What You Are Doing

- Privacy
- Authority
- Separation
- Rehearsal



So What's the Big Deal?

No One Disputes . . .

... that here, unlike in European countries, a witness is entitled to the benefit of legal counsel before testifying.



Poor Attorney-Client Preparation

Attorney: Please don't shake your head. All of your answers must be oral. Did you travel to Dallas?

Witness: Oral.

Attorney: So, your baby was conceived on July 12?

Witness: Yes.

Attorney: And what were you doing at that time?

No One Disputes . . .

... that in providing counsel to your client, you should instruct your client to tell the truth, and you should not suborn perjury.



In re Ver Dught, 825 S.W.2d 847 (Mo. 1992) (en banc)

- Attorney counseled his client in preparation for a social security proceeding not to mention that she had been remarried.
- During the proceeding, the attorney corroborated the misrepresentation by referring to his client by her maiden name.
- The court held that this violated the rule against engaging in deceit and misrepresentation before the court, and the rule against knowingly offering false evidence.



*Committee on Prof'l Ethics and
Conduct v. Crary, 245 N.W.2d 298
(Iowa 1976).*

Attorney representing client (who was secretly his mistress) instructed her to lie in a deposition for a child custody action, and helped her fabricate stories to conceal the fact that they were engaging in extramarital relations with each other.

The attorney was disbarred because his conduct was “diametrically opposed” to the fundamental duty of attorneys to bring truth to light.



So What's the Big Deal?

It's okay to instruct your witness to
tell the truth.

Everything else is in this gray area.

It's not okay to suborn perjury.

We Are Not Taught The Gray Area

We're taught to Be Prepared. But we're not taught where the line crosses from preparation to "coaching," from refreshing recollection to "implanting memories."



The Line Between Advocacy and Truth

When you tell your witness not to volunteer relevant and dispositive details unless specifically asked, are you obstructing the search for the truth?

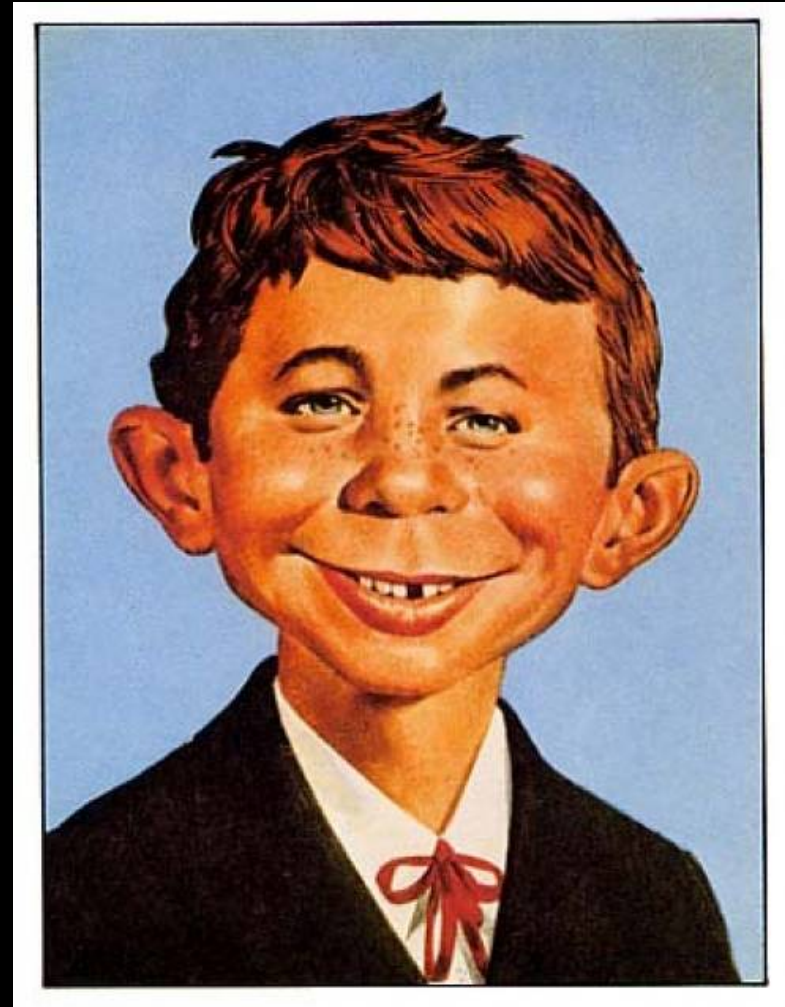
When you tell your witness to say that she had been “beaten” instead of “hit,” are you prejudicing the administration of justice?

Do you have a duty to care?



Why Worry?

- Witness preparation of non-clients is discoverable.
- Client preparation, though privileged, may come to light if the client changes lawyers or turns on you.
- Inadvertent disclosures of privileged preparation materials can happen – and you can't unring that bell.



Baron & Budd

Deposition Preparation Materials

- During deposition, junior associate inadvertently disclosed twenty-page deposition preparation memo to defense attorneys.



Baron & Budd

Deposition Preparation Materials

You will be asked if you ever saw any WARNING labels on containers of asbestos. **It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER. . . .**



Do NOT mention product names that are not listed on your Work History Sheets. The defense attorneys will jump at a chance to blame your asbestos exposure on companies that were not sued in your case.

Baron & Budd

Deposition Preparation Materials

University of Indiana Professor William Hode: “It is... appropriate for a lawyer to instruct his client how to answer questions in accordance with the truth that will best serve his case.”



Walter Olson: “That affidavit deserves an acid-free mount and mahogany frame: How better to sum up the degree of moral insight and ethical rigor that America's legal academy expects of its members?”

Clarifying the Gray Areas

Is there any guidance out there for what constitutes ethical witness preparation?

Texas Disciplinary Bright-Line Rules

- Rule 1.02(c) – A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.
- Rule 3.03(a)(5) – A lawyer shall not knowingly offer or use evidence that the lawyer knows to be false.
- Rule 8.04(a)(3) – A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

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.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Preparation consistent with the rule of this Section may include the following:

- 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 the events in that light.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Preparation consistent with the rule of this Section may include the following:

- Discussing the applicability of law to the events at issue.
- Reviewing the factual context into which the witness's observations or opinions will fit.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Preparation consistent with the rule of this Section may include the following:

- Reviewing the factual context into which the witness's observations or opinions will fit.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Preparation consistent with the rule of this Section may include the following:

- Reviewing documents or other physical evidence that may be introduced.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Preparation consistent with the rule of this Section may include the following:

- Discussing probable lines of hostile cross-examination that the witness should be prepared to meet.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Witness preparation may include **rehearsal of testimony**. A lawyer may suggest [a] 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.



American Law Institute, Restatement (Third) of the Law Governing Lawyers, Section 116

Witness preparation may

However, a lawyer may
not assist the witness to
testify falsely as to a
material fact.

material fact.



Clarifying the Gray Areas

How Do I Avoid Improperly
Influencing the Witness?

State v. Earp,
571 A.2d 1227 (Md. 1990))

Because the line that exists between perfectly acceptable witness preparation and impermissible influencing of the witness may sometimes be fine and difficult to discern, attorneys are well-advised to heed the sage advice **to 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.



Ethical Woodshedding

- 1. Prepare your witness as if it was being video recorded for future review.**

You should do nothing, say nothing, and omit nothing in a meeting with a witness that you would be uncomfortable hearing repeated in front of a judge or jury. If you would be embarrassed by, or apprehensive about, your conduct with the witness if it were shown on videotape in court, you are going too far.

Ethical Woodshedding – Salmi

2. Refresh Recollection Properly

Start the interview by asking the witness to mentally place himself at the scene where the events in question occurred. If possible, actually bring the witness to the scene of the accident, location of the meeting, and so forth. The result of either the mental or physical excursion is that the on-site interview will arouse more accurate memories.

Ethical Woodshedding – Salmi

3. Start with recollection, then clarify with documents.

Ask the witness open-ended questions. Accordingly, do not routinely ask leading questions. Likewise, do not show the witness any documents until the witness has recounted everything he remembers. Once the witness has provided an overview of the facts, use documents to focus on details that the witness may have forgotten.

Ethical Woodshedding – Salmi

4. Get the Unabridged Version of Facts – Good and Bad

Allow the witness to recount everything. In doing so, you should instruct the witness not to edit out material that seems incomplete or irrelevant. This instruction also applies to information that the witness might perceive as being harmful to the client's case. Similarly, “[i]f the attorney insists upon getting only answers to specific questions, important points may be screened out because a lawyer cannot possibly anticipate all the facts in every case.” **So make sure the witness understands that she should share everything.**

Ethical Woodshedding – Salmi

5. Spot the Inconsistencies

Recognize if the witness's story changes during the preparation process (including witness interviews, and preparation for deposition and trial). One way to prevent distortion in the witness's testimony during the preparation process is to reduce the witness interview to writing. The witness's story is less likely to change if it has been committed to writing, and if it does alter, you can confront it immediately.

Ethical Woodshedding – Salmi

5. Develop Detail without Suggestion

Finally, ask narrow and specific questions that draw on the witness's power of recognition. This approach allows the attorney to explore facts initially described or recounted in the narrative phase of the witness interview.

Good: If the witness says in his narration that he saw or opened chemical bottles while working at the steel factory, the attorney could ask, “What color were the bottles?” or “What size were the containers?”

Bad: “Did you see blue metal bottles with skull & cross bones anywhere near fans or air vents?”

Clarifying the Gray Areas

How Do I Counsel the Witness on the Law Without Influencing the Testimony? (*i.e.*, When Can I Give the Witness “The Lecture”?)

Anatomy of a Murder

- Defendant kills CW after CW allegedly raped his wife.
- Defendant's lawyer (James Stewart) decides to give Defendant the "Lecture":

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching.



Anatomy of a Murder



Dangers of the Lecture

The unintended dangers arising from lectures on the law is that the witness might mold his story to reach a certain legal outcome if the attorney provides her the opportunity to do so (*i.e.*, by explaining the law before hearing the witness's version of the facts).



Professor Richard Wydick, University of California

Four-step protocol:

- (1) Will my next question or statement overtly tell this witness that I want him to testify to something I know is false?



Professor Richard Wydick, University of California

Four-step protocol:

- (2) Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false?



Professor Richard Wydick, University of California

Four-step protocol:

(3) Is there a legitimate reason for my next question or statement to this witness?



Professor Richard Wydick, University of California

Four-step protocol:

- (4) Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness's testimony?



Clarifying the Gray Areas

Should I Instruct Not to Volunteer
Information?

Conduct of A, 554 P.2d 479 (Or. 1976).

After receiving the attorney's instruction to not volunteer information, the witness evaded the judge's questions as to his mother's whereabouts.

The witness responded that his mother was in Salem but failed to mention that she was **buried in Salem**.

Even though the attorney told his witness to tell the truth, he also advised that the witness not volunteer anything. This suggestion was taken to heart by the witness who did not mention that his mother had passed away.



Clarifying the Gray Areas

What About Collective Preparation
of Witnesses?

Joint Preparation Meetings

It's usually a bad idea.



“If you have to ask whether you are crossing the line, then you probably are standing too close to it.”

-- Michael Allen Miller, *Working with Memory* (1993).



At law school orientation one year, ... a retired judge told entering students that legal ethics is easy. “You simply find the line between what is permitted and what is not,” he said, “and stay far, far to the good side of that line.” I completely disagree, as I told my first year Professional Responsibility students in our first hour alone together.

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 – which *already* leaves you on the *bad* side of the line. Whatever distance is left to travel up to that illusive line is territory that belongs to the client and has been wrongfully ceded away.

– W. William Hodes, *The Professional Duty to Horseshed Witnesses – Zealously, Within the Bounds of the Law*, 30 Tex. Tech. L.Rev. 1343 (1999).

