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## **Counseling the Client: Refreshing Recollection or Prompting Perjury**

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# Litigation Ethics

## Counseling the Client: Refreshing Recollection or Prompting Perjury?

by Monroe H. Freedman



**Editor's Note:** *With this article by Dean Freedman, we begin what we hope will be a regular column in Litigation examining the ethical problems confronted by litigators in the adversary process. Public confidence in the integrity of the legal profession was severely shaken by the role played by lawyers in the Watergate scandal, and the shock waves from that scandal still reverberate throughout the profession. We believe that the lost confidence can be restored only if lawyers engage in open dialogues among themselves and with the public on ethical questions, and we hope this column will contribute to that dialogue.*

Experienced litigating attorneys are well aware of the vital importance of eliciting all relevant facts from the client and helping the client—who, typically, is not skilled at articulation—to marshal and to express his or her case as persuasively as possible. The poorly educated day laborer who has suffered an injury, and who can only say, “It hurts bad,” must be helped to articulate what the pain is like, when it is present, and how it interferes with work, sleep, family life, and recreation. Also, the statement, “I hurt myself while I was working,” will not be enough. The relevant details must be elicited through skilled questioning, and the witness must then be sufficiently rehearsed to assure that no important evidence will be overlooked in testimony at trial, where leading questions will not be permitted.

Numerous books and articles have been written and innumerable lec-

tures have been given about effective interviewing and preparation techniques. What has not been adequately considered, however, is the extent to which proper preparation crosses the line of ethical conduct and becomes a violation of Disciplinary Rule 7-102(A), which, among other things, forbids a lawyer to participate in the creation of false evidence. In short, when is a lawyer refreshing recollection, and when is he or she prompting perjury?

The “best legal thought” regarding proper interview and preparation techniques has been set forth in *Selected Writings on the Law of Evidence and Trial* (W. Fryer ed. 1957), which was compiled under the sponsorship of the Association of American Law Schools by a committee of the nation's leading authorities on the law of evidence. In one of the selected articles, Harry S. Bodin notes that it is generally advisable to let the client tell his or her own story while the lawyer just listens. If 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. Having gotten the client's story in narrative fashion, the lawyer must then seek additional facts that may have been omitted. That is done by asking questions and by explaining to the client how important the additional information may be to the case. “If the client can be made to understand your thoughts,” Mr. Bodin writes, “he may tell you facts which otherwise would have been inadvertently overlooked or consciously and erroneously discarded by him as immaterial.”

At the same time it is recognized that the client's story will be affected by a “subconscious suppression, psychologically induced by the wish to put one's best foot forward or by nature's trick of inducing forgetfulness

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of what one does not like to remember." That is, people will, in perfectly good faith, relate past events in a way that they believe (rightly or wrongly) to be consistent with their own interests. Necessarily, therefore, in pressing the client for additional information, and in explaining the relevance and importance of that information, the lawyer will be affecting the ultimate testimony. As emphasized by Professor Edward W. Cleary in another of the selected articles, although it is improper to prompt or suggest an answer to one's witness during the actual testimony, the interview "affords full play to suggestion . . . and evokes in advance of trial a complete verbalization, the importance of which cannot be overlooked."

### Rehearsals

The process of preparing or coaching the witness, of course, goes far beyond the initial eliciting of facts. In the course of polishing the client's testimony, eminent author Lloyd Paul Stryker recommends as many as fifty full rehearsals of direct and cross-examination. During those rehearsals, the testimony is developed in a variety of ways. The witness is vigorously cross-examined, and then the attorney points out where the witness has been "tripped" and how the testimony can be restructured to avoid that result. The attorney may also take the role of witness and be cross-examined by an associate. The attorney's "failures" in simulated testimony are then discussed, and the attorney then may conduct a mock cross-examination of the associate. In that way, "new ideas are developed while all the time the client is looking on and listening. He probably is saying, 'Let me try again.' And you will then go through the whole process once more." By that time, as one might expect, the client "does far better." In fact, after many weeks of preparation, "perhaps on the very eve of trial," the client may come up with a new fact that "may perhaps make a difference between victory and defeat."

Nowhere in those three selections relating to preparation of witnesses is there any analysis of the ethical implications of the model practices that

are set forth. Mr. Stryker does say that, in repeatedly going over the "hard spots" and the "awkward places" and in showing the client how to "surmount his difficulties," the witness is "still staying well within the truth, the whole truth, and nothing but the truth." Saying that, however, does not make it so. If people do respond to suggestion, and if the lawyer helps the client to "fill in the gaps" and to avoid being "tripped," by developing "new ideas" in the course of repeated rehearsals, it is reasonably clear that the testimony that ultimately is presented in court will have been significantly affected by the lawyer's prompting and by the client's self-interest. Whether the end product is "well within the truth, the whole truth and nothing but the truth" is therefore subject to considerable doubt.

In fact, one finds in the three selections an astonishing disregard of the ethical implications of the preparation of testimony. It is difficult to believe that one with Stryker's experience and sophistication is unaware of the impact of suggestion, which is recognized in the article by Cleary. Similarly, Cleary concerns himself only with the problem of how rules of evidence—but not the rules of legal ethics—might be reformed to take into account the psychological realities that he discusses. Bodin also recognizes the "psychologically induced" inclination to remember or forget in a way consistent with one's own interests. However, he ignores the implications of that fact when he discusses how important it is for the lawyer to make the client aware of the importance and significance of information that may have been left out of the client's original narrative.

In addition, the Bodin article (unlike Cleary's) reflects the general ignorance within the legal profession of psychological learning regarding memory. For example, Bodin says, "Experienced trial lawyers have learned that even an honest and rational client, who will not *invent* 'facts,' may nevertheless *suppress* facts." Experiments by psychologists, however, indicate that those experienced trial lawyers (whoever they may be) are wrong: invention is no less common than suppression. Bodin

also states, "Of first importance in any action are the *facts*—the *exact* facts and *all* the facts." He then explains how the lawyer must seek to elicit "all the important facts" by probing the client's memory with "detailed questioning." What Bodin does not seem to realize is that the effort to obtain "*all* the facts" is virtually certain to result in obtaining something very different from "the *exact* facts."

One of the most common misconceptions about memory is that it is a process of recollection or reproduction of impressions, closely analogous to the functioning of a phonograph record or tape recorder. In that respect, legal thinking is centuries out of date, proceeding as if highly relevant experiments in behavioral psychology had never taken place. In fact, perceiving is itself active and constructive, and memory is much more a process of reconstruction than one of recollection or recall. Moreover, the process is a highly creative one, affecting what is "remembered" as much as what is "forgotten."

### Subjective Accuracy

Thus, contrary to Bodin's assertion, an honest and rational client will invent facts as readily as suppress them. Indeed, even before the process of remembering begins, what goes into the supposed "mental storehouse" is significantly influenced by the personality and previous experiences of the observer. As noted by F.C. Bartlett, who is probably the leading experimental psychologist concerned with memory, "temperament, interests, and attitudes often direct the course and determine the content of perceiving." Nor is any dishonesty involved in that process. "[One] may do this without being in the least aware that he is either supplementing or falsifying the data of perception. Yet, in almost all cases, he is certainly doing the first, and in many cases he is demonstrably doing the second." According to another expert, the "vast majority" of testimonial errors are those of the "average, normal honest man," errors "unknown to the witness and wholly unintentional." Such testimony has been described as "*subjectively accurate*" (Please turn to page 45)

quitted.

One wonders how many persons have escaped punishment for murder solely because the death penalty was the jury's only alternative to acquittal. And one wonders why this compelling, if inverted, argument was not more forcefully advanced by the organized opponents to capital punishment in their long, untiring, and fruitful campaign to re-orient the nation's views on criminal punishment—a re-orientation that is reflected in the 1972 *Furman* opinion of the Supreme Court of the United States, equivocally abolishing capital punishment in the nation.

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## Proving Punitive Damages

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Cal. Rptr. 412, 417 (1974).

Finally, the effective trial advocate should consider the question of terminology in referring to the subject of punitive damages. The expressions "punitive" and "exemplary" have been used to describe the award. The following language of Lord Hailsham of St. Marylebone L.C. in the case of *Broome v. Cassell & Co. (H.L. (E.))*, (1972) A. C. 1027, 1073, provides some guidance:

As between 'punitive' or 'exemplary,' one should, I would suppose, choose one to the exclusion of the other, since it is never wise to use two quite interchangeable terms to denote the same thing. Speaking for myself, I prefer 'exemplary,' not because 'punitive' is necessarily inaccurate, but 'exemplary' better expresses the policy of the law as expressed in the cases. It is intended to teach the defendant and others that 'tort does not pay' by demonstrating what consequences the law inflicts rather than simply to make the defendant suffer an extra penalty for what he has done, although that does, of course, precisely describe its ef-

fect.

Whatever terminology is adopted, however, you will not maximize the recovery for your client if, in the appropriate business tort setting, you do not gear your trial preparation for seeking "punitive" or "exemplary" damages against the defendant.

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## Attorney- Client Privilege

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client's possession—both favorable and unfavorable. Only if he is fully informed can he devise the most effective strategy and tactics to promote the client's goals.

Understandably, both attorney and client will attempt to cloak the unfavorable data with the attorney-client privilege. Others, recognizing that this kind of data will be in the attorney's possession, will attempt to have it disclosed on the record. Some of these contests may well end up in the courts. The result will be a further evolution of the attorney-client privilege.

It is too early to predict the direction of that evolution. There are forceful arguments in both directions. The very fact that there are persuasive reasons to deny the privilege, indicates that we may well soon see attorneys forced to make full disclosure of all data in their possession when the issue at stake is in the legislative arena.

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## Litigation Ethics

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curate but *objectively false*."

An interesting illustration of the tendency to eliminate situational ambiguities in remembering was provided in the Senate Watergate hearings. John Dean was testifying regarding a meeting with Herbert

Kalmbach. Dean had no incentive whatsoever to lie about that particular incident. In fact, it was extremely important to him to state the facts with as much exactness as possible. He testified that he had met Kalmbach in the coffee shop of the Mayflower Hotel in Washington, D.C., and that they had gone directly upstairs to Kalmbach's room in the same hotel. Dean was pressed several times on that point, in a way that implied that his questioners had reason to believe that he was lying as to whether the meeting had taken place at all. Each time, Dean confidently reaffirmed his clear recollection about the incident. Finally, it was revealed that the register of the Mayflower Hotel indicated that Kalmbach had not been staying at the hotel at the time in question. Dean nevertheless remained certain of the occurrence, putting forth the unlikely theory that Kalmbach had been using an alias. The difficulty was cleared up when someone realized that there is a Mayflower Doughnut Coffee Shop in the Statler Hilton Hotel in Washington—and Kalmbach was found to have been registered there, under his own name, on the day in question. Thus, Dean's basic story was confirmed. Without realizing it, however, Dean had inaccurately resolved the ambiguity created by the coincidence of the two names by confidently "remembering" the wrong hotel, and by inventing the use of an alias by Kalmbach, despite the fact that he had had every incentive to report those details correctly and had come close to being seriously discredited because of his unconscious error.

### Leading Questions

Questioning is, of course, an essential part of interviewing and preparing a witness for trial. It is particularly noteworthy, therefore, that questions, even "straightforward questions of fact," may play a very strong part in inducing "importation of detail" into the process of remembering, and that leading questions, when purposefully used to induce error, succeed in doing so to a startling degree. A recent study by Elizabeth Loftus showed that witnesses' estimates of the speed of an

automobile involved in an accident will vary with the verb used by the questioner in describing the impact: "smashed" (40.8 mph), "collided" (39.3 mph), "bumped" (38.1 mph), "hit" (34.0 mph), and "contacted" (31.8 mph). In addition, twice as many witnesses reported seeing non-existent broken glass on the ground when the questioner used the word "smashed" instead of "hit." Dr. Loftus concluded that "memory itself undergoes a change" as a result of the type of question asked.

Moreover, memory in general, and responses to questions in particular, will be affected by "preferential psychological reactions." As Bartlett notes, there is a natural and honest tendency to remember-reconstruct in ways that are "strongly determined by an active subjective bias of the nature of interest."

### **Creative Process**

To sum up, the process of remembering is not one dependent upon "memory traces," which can be played back as if by placing a stylus into the groove of a phonograph record. Rather, the process is one of active, creative reconstruction which begins at the moment of perception. The reconstructive process is significantly affected by the form of the questions asked and by what we understand to be in our own interest—even though, on a conscious level, we are responding as honestly as we possibly can.

Those conclusions might seem to suggest that the conscientious lawyer should avoid giving a client or other witness an understanding of what is relevant and important and should rely only upon narrative statements unassisted by questions that seek to elicit critical facts. However, anyone who has conducted interviews will immediately recognize that such a procedure would be highly impractical. An untrained and perhaps inarticulate person cannot be expected to relate all that is relevant without a substantial amount of direction. That is why one of the most important functions of the lawyer is to provide an awareness of what is legally relevant. Moreover, the same psychological authorities support the necessity of prompting to maximize recall.

What prompting can do is to trigger recognition, which is a less complex process than remembering. Bartlett notes, for example, that in any experimental series, "only a relatively small portion of the material that can be recognized can, as a rule, be recalled." Another authority observes similarly that narrative is "the most accurate" but "the least complete" of all forms of recall. That is, if we rely only upon unprompted narrative, many important facts will be omitted, facts which can be accurately reported if memory is prompted by recognition, such as through leading questions.

### **Dilemma**

Obviously, therefore, we are faced with another dilemma. On the one hand, we know that by telling the client that a particular fact is important, and why it is important, we may induce the client to "remember" the fact even if it did not occur. On the other hand, important facts can truly be lost if we fail to provide the client with every possible aid to memory. Furthermore, since the client's memory will inevitably be affected by reconstruction consistent with self-interest, a client who has a misunderstanding of his or her own legal interest could be psychologically inclined to remember in a way that is not only inconsistent with the client's case, but also inaccurate.

The Code of Professional Responsibility is ambiguous on the general question of whether the attorney may give advice that might induce perjury. The applicable Disciplinary Rule provides only that the lawyer should not "participate in the creation" of evidence when the lawyer knows or it is obvious that the evidence is false. The relevant Ethical Considerations are of only limited assistance, in part because they are intended to be only "aspirational," and do not have the binding force of disciplinary rules. Ethical Consideration 7-5 provides that a lawyer should not "knowingly assist the client to engage in illegal conduct," and that a lawyer should never "encourage or aid" the client to commit criminal acts or "counsel his client on how to violate the law and avoid punishment therefor." However, the footnote to the Code at that

point suggests the extreme situation in which the lawyer is representing "a syndicate notoriously engaged in the violation of the law for the purpose of advising the members how to break the law and at the same time escape it." Ethical Consideration 7-6 says that the lawyer may properly assist the client in "developing and preserving evidence of existing motive, intent, or desire," but adds that, "obviously," he may not do "anything" furthering the creation or preservation of false evidence. That last proscription is extremely broad. The same Ethical Consideration also notes, however, that in many cases a lawyer may not be "certain" as to the client's state of mind, and holds that in those situations the lawyer "should resolve reasonable doubts in favor of the client."

### **Close Case**

A situation that I consider to be close to the ethical line is the following. Assume that Jurisdictions X and Y are adjacent to each other and that many lawyers practice in both jurisdictions. In Jurisdiction X, there are a large number of workmen's compensation cases in which workers strain themselves while lifting, and recover compensation. In Jurisdiction Y there is an equivalent number of such cases, but in all of them the workers who strain themselves while lifting also slip or trip on something in the process. That coincidence is fortunate, because in Jurisdiction X it is sufficient for compensation simply that the strain be work-related, while in Jurisdiction Y the applicable law requires that the injury be received in the course of an "accident," such as a slip or a trip. Obviously, the same lawyers whose clients are not slipping or tripping in Jurisdiction X are prompting their clients to recall a slip or trip when the injury is received in Jurisdiction Y.

In those cases, there are no issues of intent or of judgment, but only of objective fact. Nevertheless, even if the client's initial narrative of the incident should omit any reference to slipping or tripping, I believe that the lawyer's obligation is to explain to the client in Jurisdiction Y that one of the legal requirements for recovery is an

accident, such as a trip or slip. As we have seen in the earlier discussions of experiments by behavioral psychologists, a factual detail of that sort might very well be omitted in a narrative of the incident. Moreover, the narrator's understanding (whether accurate or inaccurate) of his or her own self-interest will affect the remembering-reconstruction of the incident entirely apart from any conscious dishonesty. Thus, the client who incorrectly assumes that tripping or slipping might preclude recovery (perhaps because it might imply carelessness) might unconsciously screen out that fact. Despite the risk, therefore, that a dishonest client might consciously invent a trip or slip to meet the needs of the occasion, the attorney is obligated to prod the client's remembering-reconstruction by explaining the relevance and importance of that factual element.

To sum up, the attorney who is interviewing and preparing a witness must take into account the psychological realities of the situation. That means, at least at the earlier stages of eliciting the witness's story, that the attorney should assume a skeptical attitude, and that the attorney should give the client legal advice that might help in drawing out useful information that the client, consciously or unconsciously, might be withholding. At the same time, there will inevitably come a point at which the lawyer knows, to a moral certainty, that the client's ability to reconstruct in good faith has been fully tapped. It is at that point, I believe, that the attorney who continues to seek the desired testimony crosses the ethical line and enters upon active participation in the creation of perjury.

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## Trial Notebook

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without some knowledge of the various techniques which the profession has developed.

1. Impeaching with a written or oral prior inconsistent statement is

one of the most effective techniques available. First, you must commit the witness thoroughly to the testimony to be impeached. Then, if you have a written statement made (or at least signed) by the witness, have *him* read it out loud to the jury. Finally, save impeachment with prior inconsistent statements for occasions where there are real inconsistencies about important matters. For a more complete discussion, see an earlier installment of this column—*Impeachment Through Prior Inconsistent Statements*, LITIGATION, Vol. 1 No. 2, p. 41 (1975).

### Set Questions

2. Set questions which are prepared in advance can often be effective. In nearly every trial there is some situation that can be dramatized by a series of questions which you know can reasonably be answered only one way, so that you almost do not care how they are actually answered. Often this sort of questioning will take the form of a "flanking attack" where apparently innocent truisms and preliminary matters suddenly add up to a major inconsistency.

3. Like set questions, there are other techniques for establishing facts which turn out to be inconsistent with the testimony on direct. One of these deals with attacking estimates of speed. It is helpful to remember that multiplying miles per hour by one and one-half gives a very close approximation of feet per second. Thus  $60 \text{ mph} \times 1\frac{1}{2} = 90$  feet per second (the exact figure is 88 feet per second). Since most trial judges will take judicial notice of this relationship, and since most witnesses' estimates of time and distance vary widely from their estimates of speed, having the witness help you perform a little calculation on a blackboard can often convince the jury that none of his estimates are very valuable.

4. Occasionally it becomes important to attack a time or distance estimate itself. While it is usually necessary to ask the judge's permission to conduct in-court experiments, when you are testing the ability of the witness to estimate time or distance, the custom in most courts is to permit it without obtaining any special leave. But this sort of ploy is dangerous, and

you must be as ready to let the jury know that the estimate was accurate as if it had been faulty, which leads most careful counsel to ask for the estimates in an innocuous fashion before proceeding to demonstrate their inaccuracy.

5. Sometimes it is not possible to question a witness in advance of trial. Prosecutors in criminal cases operate under this handicap. Frequently they may have no idea what witnesses the defense may call. In some cases, especially where self-defense is an issue, the defendant can almost be counted on to testify on his own behalf. The usual defense practice is to call the defendant as the last witness. Because the sequestration of witnesses obviously cannot apply to the defendant, some prosecutors ask for leave to withhold cross-examination of all other witnesses, delaying their cross until after the defendant has testified. Their hope is to keep the defendant from changing his story to fit the details on which the other defense witnesses have not yet committed themselves. This device obviously requires the cooperation of the trial court and a somewhat quiescent defense lawyer. Moreover, separating cross-examination from direct examination, especially in a long trial, gives the defendant an opportunity to develop his case without serious interruption. On the other hand, there are prosecutors who claim substantial success with this technique.

### Marginal Device

6. A more marginal device is the "I don't know" cross-examination. In a well prepared civil case there are usually complete depositions of all witnesses. These often contain large numbers of questions to which the witness simply does not know the answer. The "I don't know" technique is to scour the deposition of the witness for every question which the witness does not know the answer to, and then ask that question on cross-examination. If he now knows the answer, he can be impeached with the deposition. Usually, however, he still does not know and gives that answer to a long string of questions. The net effect is that the witness has very little information of any importance to the action. Of course, if the technique is not carefully employed and is spotted