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"Do we implant memories? Yeah, probably we do. Is that something that is wrong? I don't believe it is."[1]

Unethical witness preparation—improperly attempting to shape a witness's substantive testimony—directly undermines a fair adjudicative process, which depends on truthful witness testimony as its cornerstone. Some lawyers nevertheless exhibit marked pride in what they consider to be their skills at what variously is called witness "coaching," "prepping," "horse-shedding,"[2] "wood-shedding" or "sandpapering." Whatever designation is ascribed to this practice, it is an open door to potential trouble in the post-*Enron* ethical and corporate governance climate.

Although it is difficult to delineate precisely how far a lawyer may go in conducting witness preparation, reasonably clear boundaries do exist, beyond which the line of unethical witness coaching has been crossed.[3] This article discusses ethical considerations relating to preparation of witnesses for depositions, hearings and trial testimony.

Ethical Tension

The extent to which a lawyer may "prepare" a witness to deliver his or her independent, raw recollection gives rise to competing ethical responsibilities—serving the lawyer's "special obligation" to protect the adjudicative system balanced with the lawyer's obligation to do one's best for the client. Situational and/or human cognitive factors also may invite potential improper witness coaching:

- The trier-of-fact's perception of important witnesses usually determines the outcome of cases. Substantial pressure therefore exists to improve the presentation of testimony.
- Human memory is highly fallible. Suggestive questioning can distort a witness's underlying memory and, in the extreme case, produce an entirely false recollection.
- Both the client and the lawyer are highly motivated to prevail in the litigation.
- Witness preparation sessions almost invariably occur in private, coupled with potential applicability of the attorney–client privilege or the work product doctrine.
- Witnesses often are family members or employees of the client, or otherwise may be persons whose interests are fully aligned with those of the client.

These circumstances frequently coalesce to create a litigation scenario in which there is "mutual self-interest to create a beneficial revisionist history."[4]

Another source of ethical tension results from the changed ethical culture in which lawyers now prepare witnesses for their testimony. Courts routinely discourage manipulation or interference by advocates with the litigation fact-finding process. This culture includes the acknowledgment that the general purpose of witness testimony "is to find out what a witness saw, heard, or did—what the witness thinks."[5] Lawyers must "accept the facts as they develop"[6] rather than engage in what one court referred to as "coaching or bending the witness's words to mold a legally convenient record."[7]

Importance of Preparation

Legitimate witness preparation is an expected and essential part of deposition and trial preparation. Courts frequently observe that it is proper for a lawyer to prepare a witness for deposition or trial testimony.[8] As one state supreme court noted, "Such preparation is the mark of a good trial lawyer and is to be commended."[9] Another court even considered witness preparation to be a lawyer's ethical duty.[10]

Ethics Rules

Although easily stated, the application of general ethical principles may become uncertain in the context of actual witness preparation.[11] The line between proper witness preparation and behavior that, looking backward, will be described as unethical manipulation of a witness's testimony often can be difficult to ascertain. As the U.S. Supreme Court emphasized more than three decades ago, "An attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it."[12]

In Arizona, no single, specific ethics rule pertains directly to witness preparation. Several of the Arizona Rules of Professional Conduct do provide substantial guidance, however, regarding the legitimate scope of witness preparation:

- A lawyer cannot counsel or assist a witness to testify falsely (ER 3.4(b)).

"Aren't You Really Telling Me...?"

Ethics and Preparing Witness Testimony

- A lawyer cannot offer an inducement to a witness that is prohibited by law (ER 3.4(b)).
- A lawyer cannot counsel or assist a client in conduct the lawyer knows is criminal or fraudulent (ER 1.2(d)).
- A lawyer cannot offer evidence the lawyer knows to be false; the lawyer must take reasonable remedial measures when a lawyer learns that the lawyer, the client or a witness called by the lawyer has offered false material evidence, including (if necessary) disclosure to the tribunal (ER 3.3(a)(3)).
- If a litigation consultant has been employed to assist in witness preparation, the lawyer "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance the person's conduct is compatible with the professional obligations of the lawyer" (ER 5.3(a)).
- A lawyer cannot engage in conduct including dishonesty, fraud, deceit or misrepresentation. (ER 8.4(c)).
- A lawyer cannot engage in conduct prejudicial to the administration of justice. (ER 8.4(d)).

Negligently counseling or assisting a witness to testify falsely may violate ER 3.4(b) under Arizona law. The literal language of ER 3.4(b), which precludes counsel or assistance to provide false witness testimony, does not contain a "knowledge" requirement.[13] The Arizona Supreme Court nevertheless has suggested that ER 3.4(b) "expressly or impliedly require[s] some sort of knowledge on the part of the attorney."[14]

More recently, however, the Arizona Supreme Court stated, "If the Ethical Rules require a higher mental state [other than negligence], they usually specify the mental state required."[15] Therefore, some question currently exists regarding whether an ER 3.4(b) violation may rest upon a lawyer's negligent conduct because the literal language of that ethics rule does not contain a

"knowledge" requirement.[16] Given the absence of a "knowing" or "intentional" mental state in the language of ER 3.4(b), it is probable that a lawyer's negligent misconduct during witness preparation will be deemed sufficient to establish a violation of the rule.

Counseling or assisting false testimony potentially has more serious consequences where the witness is a client. When the falsity of the client's testimony is revealed, the client's prospects for success in the litigation will be virtually destroyed. The client also may be exposed to criminal prosecution for perjury. Counseling or assisting false client testimony thus also may be viewed as causing intentional prejudice or damage to the client.[17]

Disbarment or suspension is the usual sanction for counseling or assisting false witness testimony.[18] "Testimony" under ER 3.4(b) also includes counseling or assisting a client in providing false answers to interrogatories or responses to requests for admission; it is not limited to oral testimony.[19]

It obviously is unethical and illegal for a lawyer to offer a benefit in exchange for testimony with the intent to influence that testimony.[20] ER 3.4(b) (precluding the offering of certain inducements to witnesses) does not prohibit the payment of fees to a fact witness, however, as long as such compensation is not based on outcome and the amount is reasonable. Arizona has an ethics opinion (No. 97-07) which approves payment of a reasonable fee to a fact witness for time spent preparing for testimony, being interviewed and/or for testifying at deposition or trial.[21]

The reasonableness of the fee must be evaluated by the lawyer on a case-by-case basis, recognizing that an unreasonably high fee will tend to appear as an unethical and illegal inducement to influence witness testimony.[22] The best practice is to memorialize the fee arrangement in writing and specifically instruct the witness that the payment of compensation should not influence the substance or strength of the witness's testimony.

A violation of ER 8.4(c) (dishonesty, fraud, deceit or misrepresentation) must be based on behavior that is "knowing" or "intentional" and purposely deceives or involves dishonesty or fraud. A lawyer cannot violate ER 8.4(c) by mere negligence in conducting witness preparation.[23]

In contrast, a lawyer can negligently violate ER 8.4(d) (conduct prejudicial to the administration of justice).[24] Although not intentional or "knowing," a lawyer's negligent misconduct during a witness preparation session thus may be sanctionable under ER 8.4(d) as prejudicial to the administration of justice.

Obvious "Don'ts"

The Arizona Supreme Court reaffirmed the importance of a lawyer's duty to obtain and offer only truthful testimony in *In re Peasley*,[25] decided in 2004. In *Peasley* the Court disbarred a former prosecutor for, among other things, violating ER 3.3(a)(3) by presenting misleading and false witness testimony in two separate trials.

Writing for the court, Justice Ryan observed, "'There is no more egregious violation of a lawyer's duty as an officer of the court, and no clearer ethical breach' than deliberately eliciting false testimony from his client."[26] The Court remarked that "even the most inexperienced lawyer knows that he or she should not elicit false testimony."[27] These cautionary words should be held squarely in mind whenever any lawyer is about to "prepare" a witness for his or her testimony.

Ethical witness preparation occurs without influencing the substance of testimony or "reshaping" the witness's raw, independent recollection.[28] It is appropriate and legitimate to enhance the manner and clarity with which a witness will present his or her untainted recollection. Conversely, it is not appropriate to attempt to change the substantive testimony of the witness, nor to suggest answers or fill the witness with information. As recognized by one court more than a century ago, the lawyer's "duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not teach him what he ought to know."[29]

Here are some obvious "don'ts" concerning witness preparation:

- A lawyer obviously cannot encourage or suborn perjury by the witness or engage in other flagrant misconduct to elicit false testimony from the client or witness.[30]
- Questions, illustrations or statements cannot be used to directly or impliedly suggest the lawyer wants the witness to testify falsely or in any certain manner other than the complete truth.
- A lawyer should not "pour" facts into the witness or supply a suggested recollection of facts that previously was unknown to the witness.
- Statements such as "It's OK if you don't remember or don't recall" are improper if made as part of an effort to encourage a failure of recollection by the witness. A lawyer should not ask questions or make statements that would subvert or suppress a witness's actual recollection; the witness cannot be counseled to become "forgetful" or evasive.[31]
- A lawyer should not state or suggest that the actual intended meaning of the witness's prior statements should be changed to create a misleading alternate meaning for those words.
- A witness should not be asked to falsely display emotion during testimony.
- A witness (unless a client) should not be instructed to refrain from talking with opposing counsel.
- "Mock" questioning, rehearsals or other preparation techniques should not be used to modify the substantive content of a witness's actual recollection.

Witness preparation matter-of-factly should not include any intent or effort to change the substance of a witness's independent recollection, although the witness may be asked to reconsider the witness's recall in light of contradictory testimony or other evidence.

Appropriate Preparation

Ethical witness preparation should have several general purposes.

- To ascertain the witness's recollection fully and objectively.
- To discuss ways to present the witness's recollection in an effective and accurate manner.
- To discuss legitimate means to protect the witness's testimony from being distorted or discredited by adversarial attack.[32]

Specific guidance regarding the permissible scope of witness preparation can be found in the decisional law[33] and in the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §176, comment (b). Appropriate witness preparation presently appears

to include at least the following conduct:

- Ascertaining and discussing the witness's recollection and the probable facts.
- Discussing probable lines of hostile cross-examination the witness should be prepared to meet.
- Rehearsing the witness's testimony.
- Discussing a witness's prior testimony to refresh the witness's recollection.
- Discussing and revealing the testimony of other witnesses and asking the witness to reconsider his or her recollection of events in that light (except when the rule on exclusion has been invoked during a hearing or trial).
- Suggesting a choice of words *solely* to clarify a witness's testimony (but not to change substantive testimony or to cause the witness to testify falsely regarding a material fact).
- Informing the witness regarding applicable law and its relation to the events at issue (but not for the purpose of inducing a witness to misrepresent the facts).
- Discussing the possible inclusion of testimony regarding factual matters not initially mentioned by the witness, but only if the witness has an actual recollection regarding the matter.
- Inviting the witness to provide truthful testimony that may be favorable to the lawyer's client.
- Reviewing with the witness the factual context into which the witness's testimony will fit.
- Discussing courtroom or deposition demeanor and procedure.

Improper and unethical witness coaching unquestionably will evoke harsh disciplinary and/or court sanctions against the offending lawyer.

All of these witness preparation techniques presently appear to be permissible under the decisional law and/or the RESTATEMENT.

Witness preparation of corporate executives and managers also should be modified in light of the post-*Enron* skepticism—sometimes overt antagonism—that jurors and triers-of-fact frequently display toward corporate executives and management. Repeated corporate witness responses of "I don't know" or "I don't recall" are far less acceptable to jurors and courts in modern litigation.[34]

Similarly, the customary instruction to the witness "Don't volunteer information" requires rethinking. Jurors, as well as the courts, now tend to hold all witnesses—and particularly corporate executives and management—to their oath "to tell the truth, the whole truth, and nothing but the truth."[35] A witness who fails to be forthcoming and cooperative during cross-examination may be viewed as attempting to conceal or withhold relevant information. Even if a question is awkward or confusing, it now may be more advantageous for the witness to simply answer the question that the examiner was attempting to ask.[36]

Enhancing Linguistic Style

Witness preparation focusing on nonverbal behavior (body language) and linguistic style obviously also may be used to enhance the trier-of-fact's perception of a witness's competence, credibility and trustworthiness.[37] In doing so, does the advocate violate any duties to the court, and specifically the duty of candor to the tribunal?

If such preparation is intended to modify only the manner in which testimony is presented and not to change its content, the preparation should be viewed as ethical. Attempting to eliminate potentially offensive witness mannerisms, or to eliminate the witness's use of "powerless" speech phrases such as "you know," "I guess," "um," "well," or the like, should pass ethical muster.

Contrast this with the lawyer who "reshapes" the witness's testimony by suggesting specific substantive words or answers for responses to anticipated examination.

Preparing Witnesses During Trial

Rule 615 of both the state and federal court evidence rules provides for the exclusion of witnesses during trial "so that they cannot hear the testimony of other witnesses."[38] The court "may make the order of its own motion," and often may issue an order that specifically prohibits witnesses from reading trial transcripts or discussing their anticipated testimony with other potential witnesses.[39] A lawyer who abrogates the "rule on exclusion" also violates ER 3.4(c) (knowing disobedience of an obligation imposed under court rules) and ER 8.4(d) (conduct prejudicial to the administration of justice).

Once the rule on exclusion has been invoked, it is not proper to prepare an excluded trial witness by reciting or providing a transcript of the testimony of an earlier witness. Of course, parties and other persons whose presence is shown to be essential to the presentation of a party's cause have the right to be present during the trial proceeding, and therefore will hear the live testimony adduced in the case. Testimony of excluded nonparty witnesses, however, should not be sculpted based on what

others may have had to say.

The obligation of a trial advocate is to elicit and bring out the truth, not to shape the testimony of excluded trial witnesses to corroborate or dispute the testimony of other witnesses. The experiences and testimony of the witness should remain "untainted and uninfluenced by the views of others."[40]

Joint Preparation

Interviewing and preparing several potential witnesses at the same time and in the same setting presents multiple ethical problems. It generally should be avoided.

In addition to triggering potential conflict of interest issues, a joint preparation session ineluctably will influence and reshape a witness's independent recollection as the witness hears the statements of other witnesses. The witness's independent recollection may be even more susceptible to change where the joint session includes witnesses whose economic interests are dependent upon others participating in the session (for example, employer and employee).

In the end, it may become difficult to disentangle a witness's independent recollection from the information obtained during a joint preparation session.[41]

Does Preparation Facilitate Truth-Seeking?

Witness preparation techniques such as rehearsal of testimony, conducting a "mock" cross-examination of witness testimony, suggesting a choice of words to "clarify" a witness's testimony, or discussing applicable law and its application to the facts (even before obtaining the witness's recollection) are practices easily manipulated by an unscrupulous lawyer. The use of trial or litigation consultants to prepare witnesses also may add to the ethical dilemmas presented by witness preparation.[42]

By way of comparison and contrast, British barristers follow a code of ethical conduct that expressly provides, "A barrister must not rehearse, practise or coach a witness in relation to his evidence."[43] In British courts, improper witness coaching by barristers is expressly forbidden and is viewed as a very serious ethics offense.

Witnesses in Great Britain are permitted to undergo "witness familiarisation," which familiarizes witnesses with the layout of the court and the probable sequence of events when the witness is giving evidence. "Witness familiarisation" by British barristers also may appropriately include advising the prospective witness regarding the basic requirements for giving testimony (the need to listen carefully and to answer the questions asked; to speak slowly, audibly and clearly; and to avoid irrelevant comments). Mock examination-in-chief or cross-examination may be permitted "if, and only if … the exercise is not based on facts which are the same as or similar to those of any currently impending trial, hearing or proceedings at which a participant is or is likely to be a witness."[44]

Legitimate arguments can be made that any benefits or efficiencies the Arizona legal system potentially may realize from allowing extensive witness preparation are substantially outweighed by the potential or actual harm of such practices. It is arguable that aggressive and unrestrained witness preparation merely enables lawyers and litigants to conceal and misrepresent the truthful facts and to formulate a different, more favorable version of events.

After all, how does the adjudicative system truly benefit from repeated "rehearsals" of witness testimony with a lawyer (sometimes with the assistance of professional trial consultants)? Is testimony given by a witness who repeatedly has rehearsed the lawyer's or the litigation consultant's "suggested choice of words" a fair and accurate presentation of that witness's actual recollection regarding the facts? Does allowing such witness preparation practices seriously interfere with and undermine the ability of judges and juries to evaluate the untainted credibility of the witness?

These important questions merit further consideration by Arizona lawyers and the courts. Although there may be no immediate need for the courts to restrict witness preparation beyond existing limits, lawyers must recognize that the line between assisting and corrupting the adjudicative process can become difficult to maintain in the context of witness preparation.

Some lawyers undoubtedly will remain of the view that they should have an unqualified and unlimited right to "prepare" their witness in any manner they choose, and that cross-examination of the witness is sufficient to reveal the extent of the preparation. The fact that a witness will be cross-examined regarding the preparation, however, certainly cannot be a substitute for ethics. Similarly, the argument that acting ethically in witness preparation will disadvantage your client because the rules may be difficult to enforce and "the other side will do it" does not provide a basis for any lawyer to ignore ethical obligations.

More prevalent, perhaps, is the attitude that lawyers need not avoid witness coaching, but should avoid doing it in a way that can be proven. This sardonic attitude is that a good witness preparation session is one that effectively shapes the witness's testimony but will withstand opposing counsel exposing what actually occurred. Although this practice and these attitudes have existed for decades, conducting witness coaching sessions in such a manner is very risky business in the current ethical and corporate governance environment.

Recent Arizona Supreme Court opinions send a clear admonition that the most serious sanctions will be imposed for lawyer misconduct that undermines the credibility, fairness or efficacy of the legal process. Improper and unethical witness coaching unquestionably will evoke harsh disciplinary and/or court sanctions against the offending lawyer.

Conclusion

Lawyers and courts obviously cannot and should not cynically assume that, if given the opportunity, lawyers will act unethically and encourage witnesses to falsify their testimony or to withhold information that should be disclosed. Yet practices previously viewed as acceptable witness preparation may no longer be tolerated in a post-*Enron* world, particularly given the judiciary's renewed emphasis on the lawyer's role as an officer of the court and a protector of the adjudicative system. Lawyers must carefully review their witness preparation techniques to make certain that they are preparing the witness without influencing the substance of testimony or manipulating the witness's raw recollection.

endnotes

1. Statement regarding witness preparation by Frederick Martin Baron, Esq., Dallas, Tex. (plaintiffs' lawyer in asbestos litigation and former Vice-President of American Trial Lawyers Association), DALLAS OBSERVER, Aug. 13, 1998.
2. Legal scholars credit James Fennimore Cooper with creating the term "horse-shedding." *See* GENE FOWLER, THE GREAT MOUTHPIECE: A LIFE STORY OF WILLIAM J. FALLON 93 (1931) (*cited in* Gershman, *infra* note 32). Apparently there were carriage and/or woodsheds near the courthouses in which lawyers were known to "prepare" their witnesses prior to trial.
3. *See generally* Joan Rogers, *Special Report*, *Ethics of Witness Preparation*, 14 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 48 (Feb. 18, 1998); Alec Rothrock, *Coaching the Witness*, TRIAL TALK (Colorado Trial Lawyer's Ass'n) (Feb./Mar. 2000); Richard C. Wydick, *The Ethics of Witness Coaching,* 17 CARDOZO L. REV. 1 (Sept. 1995); Nicole LeGrande & Kathleen Mireau, *Witness Preparation and the Trial Consulting Industry*, 17 GEO. J. LEGAL ETHICS 947 (Summer 2004).
4. Stewart I. Edelstein, *Preparing Your Client's Testimony*, CONN. LAW TRIB. (August 1998).
5. *Hall v. Clifton Precision Systems*, 150 F.R.D. 525, 528 (E.D. Pa. 1993).
6. *Id.*
7. *Id.*
8. Rothrock, *supra* note 3, at 3; *State v. McCormick*, 259 S.E.2d 880, 882 (N.C. 1979).
9. *McCormick*, 259 S.E.2d at 882.
10. *See, e.g.*, *State ex rel. Means v. King,* 520 S.E.2d 875, 881 (W. Va. 1999).
11. Edelstein, *supra* note 4, at 1-2.
12. *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976).
13. "Knowledge" for purposes of finding an ethics violation means "actual knowledge of a fact in question," although actual knowledge may be inferred from the circumstances. ER 1.0(f).
14. *In re Shannon*, 876 P.2d 548, 560 (Ariz. 1994).
15. *In re Clark*, 87 P.3d 827, 830 (Ariz. 2004).
16. The national commentators do not agree regarding the quantum of "knowledge" that will give rise to a violation of ER 3.4(b) in the context of witness preparation. *Compare* Wydick, *supra* note 3, at 3 (requisite knowledge exists when a lawyer knows that witness is "practically certain" to interpret lawyer's conduct as inducement to testify falsely) *with* Joseph D. Piorkowski, Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 GEO. J. LEGAL ETHICS 389, 404 n.71 (1987) (attorney may be disciplined under Rule 3.4(b) for constructive knowledge or what attorney "should have known").
17. *In re Corizzi*, 803 A.2d 438, 440 (D.C. Ct. App. 2002) (disbarment for instructing two witnesses to lie at depositions to conceal facts).
18. *See, e.g.*, *Matter of Elowitz*, 866 P.2d 1326 (Ariz. 1994) (ER 3.4(b) violated by lawyer inducing false deposition testimony); *In re Edson,* 530 A.2d 1246 (N.J. 1987) (disbarment for counseling client to falsify testimony to fabricate extrapolation defense in DUI trial); *In re Oberhellmann*, 873 S.W.2d 851 (Mo. 1994) (disbarment for advising client to give false deposition testimony).
19. *In re Feld's Case*, 815 A.2d 383 (N.H. 2003). *But see Physicians Choice of Arizona, Inc. v. Visual Changes Skin Care Int'l, Inc.*, 2006 WL 726903 (D. Ariz. 2006) (no ER 3.4(b) violation where litigant offers financial reward to obtain documentary evidence but not testimony).
20. *See* Ariz. Ethics Op. 83-3; A.R.S. § 13-2802; *Laos v. Soble,* 503 P.2d 978 (Ariz. Ct. App. 1973) (agreement to pay witness fee contingent on success of litigation is against public policy and void). In the criminal context, a lawful plea agreement to obtain truthful testimony will not violate ER 3.4(b), nor will it abrogate A.R.S. § 13-2802, which makes it unlawful to "confer any benefit upon a witness with the intent to … influence the testimony of that person." *State v. Canez*, 42 P.3d 564 (Ariz. 2002).
21. Ariz. Ethics Op. 97-07.
22. *See also* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996) (payment of witness compensation).
23. *In re Clark*, 87 P.3d at 830.
24. *Id.*
25. *In re the Matter of Peasley,* 90 P.3d 774 (Ariz. 2004).
26. *Id.* at 778, *quoting Board of Overseers v. Dineen*, 481 A.2d 499, 501 (Me. 1984).
27. *Id.*
28. *Geders v. United States*, 425 U.S. 80, 90 n.3 (1976); Piorkowski, *supra* note 16, at 401.
29. *In the Matter of Titus B. Eldridge, an Attorney*, 82 N.Y. 161 (1880).
30. A perjury prosecution may be pursued if the witness has been counseled to testify to a false claim of lack of memory. *See, e.g.*, *United States v. Barnhart*, 889 F.2d 1374, 1376-80 (5th Cir. 1989) (perjury conviction upheld where corporate official instructed witness to "get dumb").
31. *See* Christopher T. Lutz, *Fudging and Forgetting*, LITIG. 10, 11 (Spring 1993); James M. Altman, *Witness Preparation Conflicts*, LITIG. 38, 43 (Fall 1995) (instructing witness not to volunteer information "can become part of a general strategy of concealment and evasion").
32. Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 851 (2002).
33. *See generally* Rothrock, *supra* note 3, at 3; Rogers, *supra* note 3, at 53.
34. Linda Listrom, *Keep Executive Witnesses From Falling Off the Credibility Cliff*, CORP. COUNSELOR (July 14, 2006). According to Listrom, jurors often are motivated by fear. Jurors look to large corporations as a source of economic security, and therefore punish corporate wrongdoers to stave off unwanted risks.
35. Early oaths to testify truthfully and completely were sworn on the male genitals, "with castration the implicit punishment for perjury." Thomas G. Guthiel, M.D., *et al.*, *"The Whole Truth" Versus "The Admissible Truth": An Ethics Dilemma for Expert Witnesses*, 31 J. AM. ACAD. PSYCHIATRY LAW 422-27, at 423 (No. 4, 2003). The word *testis* is of Latin derivation, referring to the theory that the Romans placed their right hand on their testicles and swore by them before giving testimony in court. The Latin *testis* thus originally meant "witness" or "legal supporter." *Id.*
36. Listrom, *supra* note 34.
37. As much as 60 percent of communication occurs through the nonlinguistic component of a communication, as well as through the "linguistic style" of a witness. Eye contact, for example, and specifically "gaze maintenance" or "gaze aversion," is linked to listeners' perceptions. Variables such as the rate, volume, intensity, tone and pitch of the voice also can influence the persuasiveness of testimony. Captain Jeffrey D. Smith, *The Advocate's Use of Social Science Research Into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?,* 134 MIL. L. REV. 173, 174-84 (1991).
38. FED.R.EVID. 615; ARIZ.R.EVID. 615.
39. The rule is designed to discourage and expose fabrication, inaccuracy and collusion. FED.R.EVID. 615 (Advisory Committee Note).
40. Stephen Gillers, NYU School of Law, *quoted in* "Embattled Lawyer Had Limited Role in 9/11 Trial," WASH. POST (online) Mar. 16, 2006, at A01.
41. Simultaneously preparing witnesses also will enable opposing counsel to assert that the witnesses got together and contrived their testimony. Even where the preparation session involves a client who is a party, the fact of the consultation, the identity of all participants in the preparation session, and the date and place of the session are discoverable. *In re Grand Jury Subpoenas*, 803 F.2d 493 (9th Cir. 1986); *State v. Adamson*, 665 P.2d 972 (Ariz. 1983), *cert. denied*, 464 U.S. 865. Where a non-client witness is prepared, everything about the preparation session will be discoverable.
42. LeGrande & Mireau, *supra* note 3.
43. Code of Conduct of the Bar of England and Wales, Pt. VII, Rule 705(a) (available at www.barcouncil.org.uk)
44. *Id.*, "Guidance on Witness Preparation," at ¶12(4)(c).