

Ethical Issues in Preparing and Questioning Witnesses

Preparing Witnesses

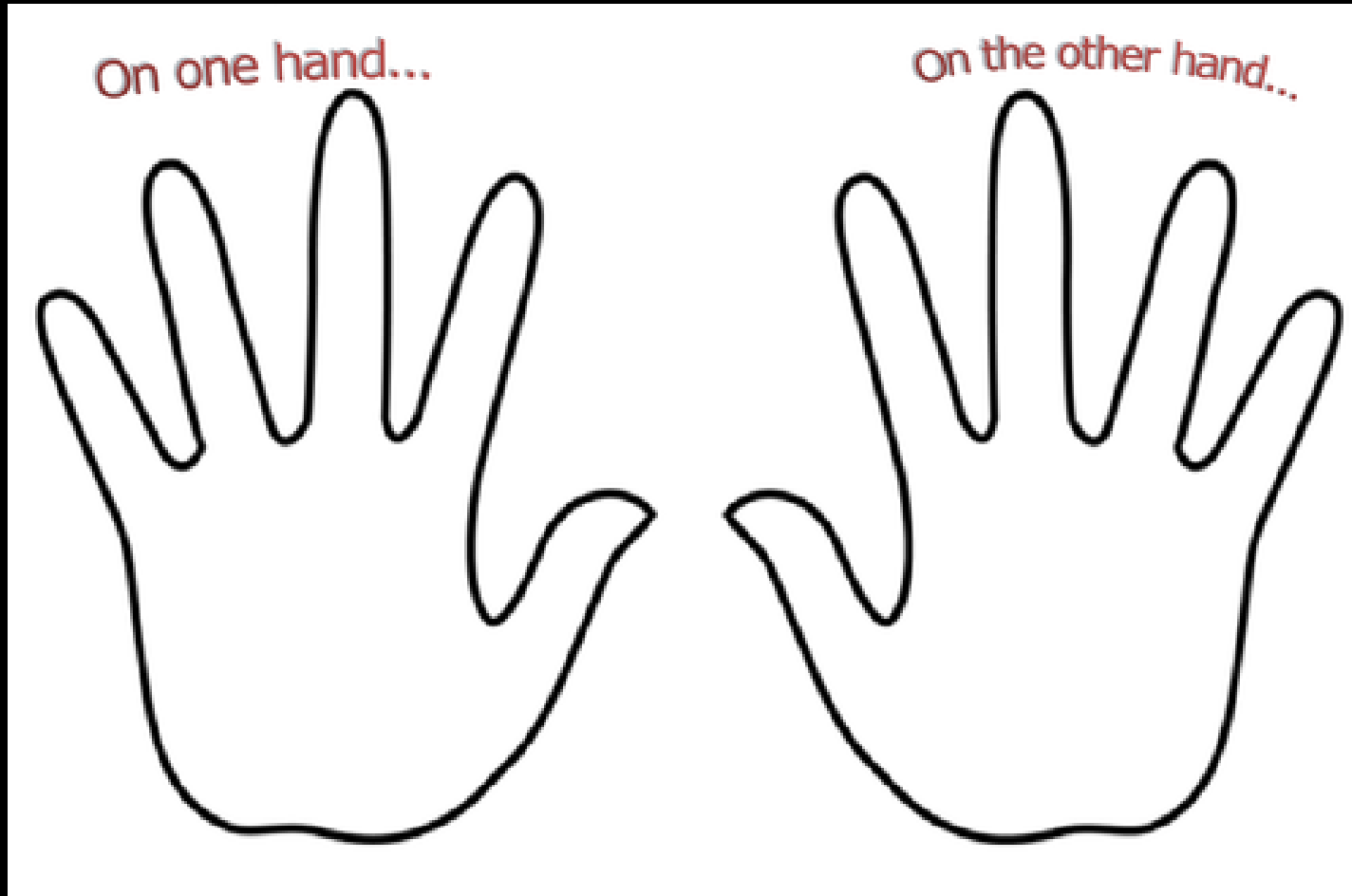
“A lawyer may interview a witness for the purpose of preparing the witness to testify.”

Restatement (Third) of the Law Governing
Lawyers, § 116(1)

“[A] lawyer has an ethical duty to prepare a witness.”

Christy v. Pennsylvania Tpk. Comm'n, 160
F.R.D. 51, 53 (E.D. Pa. 1995)

On the other hand . . .



“A lawyer shall not . . . counsel or assist a witness to testify falsely”

Rule 3.4(b)

Rhode Island Rules of Professional Conduct

“A lawyer may interview a witness for the purpose of preparing the witness to testify.”



“A lawyer shall not . . . counsel or assist a witness to testify falsely”

Is there any tension?

Some common advice – tell the witness to:

- answer truthfully
- maintain neutrality
- only answer the question asked
- give only the best present recollection
- refrain from volunteering information
- testify only from personal knowledge
- use everyday language
- testify spontaneously
- avoid memorization
- pause before answering
- admit to lack of knowledge where appropriate, and
- clarify any unclear questions.

“The ‘rule of thumb’ [is] that an attorney may instruct a witness *how* to testify, but should refrain from telling a witness *what* to say.”

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, 390 (1987)

Is it really that easy?

Before you tell me your side of the story, let me tell you what the law is in this area . . .

Aren't you really telling me . . .

Does any of this ring a bell?

Well, that's not how your boss remembers it.

If you say that, you'll lose.

“[S]ooner or later, most of us trim the sail of the testifying client a bit too much. It is one thing to say, ‘No perjury,’ and yet another to avoid it always or to encourage it never.”

Berg, *Preparing Witnesses*, Litigation, Winter 1987, at 13-14)

What to say to the witness right up front?

The most
important thing is
to tell the truth.

*Now, the truth is
an elusive
concept . . .*

Is there any more concrete advice out there?

Some (More) Basic Principles





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

Restatement (Third) of the Law Governing
Lawyers, § 116, comment b

According to the Restatement, witness preparation may properly include:

“Discussing the role of the witness and effective courtroom demeanor;”

“discussing the witness's recollection and probable testimony; . . .”

Could reviewing a witness's recollection ever amount to improper witness coaching?

- Your client is charged with murder.
- He will be defending at trial on grounds of self-defense.
- A witness, Mrs. W., observed the event.
- She agrees to come to your office for pretrial preparation.
- She describes the following:

“Your client was being terribly beaten until he pulled out a knife and repeatedly thrust it into his attacker's heart.”

TEST PROBLEM

- You are concerned that if she testifies that he “repeatedly thrust” the knife “into the attacker's heart,” these words convey viciousness that could convince the jury it was not just self-defense.
- Is it ethically proper to suggest that Mrs. W use different words?

TEST PROBLEM

The Restatement says:

“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.”

Does this help?

Possible approach:

- “Mrs. W, if you say that, the jury could think this was just a fight. Could you use words that will make my client look better?”
- Good idea?

TEST PROBLEM

Better approach:

- Mrs. W, let me ask about what you said, that my client “was being terribly beaten,” and then my client’s response, he thrust his knife “into his attacker's heart.”
- Mrs. W, do you know for a fact that the knife went into his heart?
- *[no, not specifically, I saw it go into his chest]*

TEST PROBLEM

- And Mrs. W, when you say “repeatedly,” what does that mean to you?
- *[well, it was several times, maybe two or three]*
- “So what you are really saying is that you saw my client being severely beaten, and he responded by stabbing his attacker, maybe two or three times in the chest?”
- *[yes]*

TEST PROBLEM

- “Remember, at trial, you will need to describe what you saw as honestly and accurately as you can.”
- Will you be sure to use words that accurately describe what you saw?

TEST PROBLEM

“Attorneys should exercise the utmost caution, however, in recommending changes in word choice to a witness.”

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, 400–01 (1987)

“The line is not easily drawn between proper review of the facts and refreshment of the recollection of a witness and putting words in the mouth of the witness or ideas in his mind.”

Hamdi & Ibrahim Mango Co. v. Fire Ass'n of Philadelphia, 20 F.R.D. 181, 183 (S.D.N.Y. 1957)

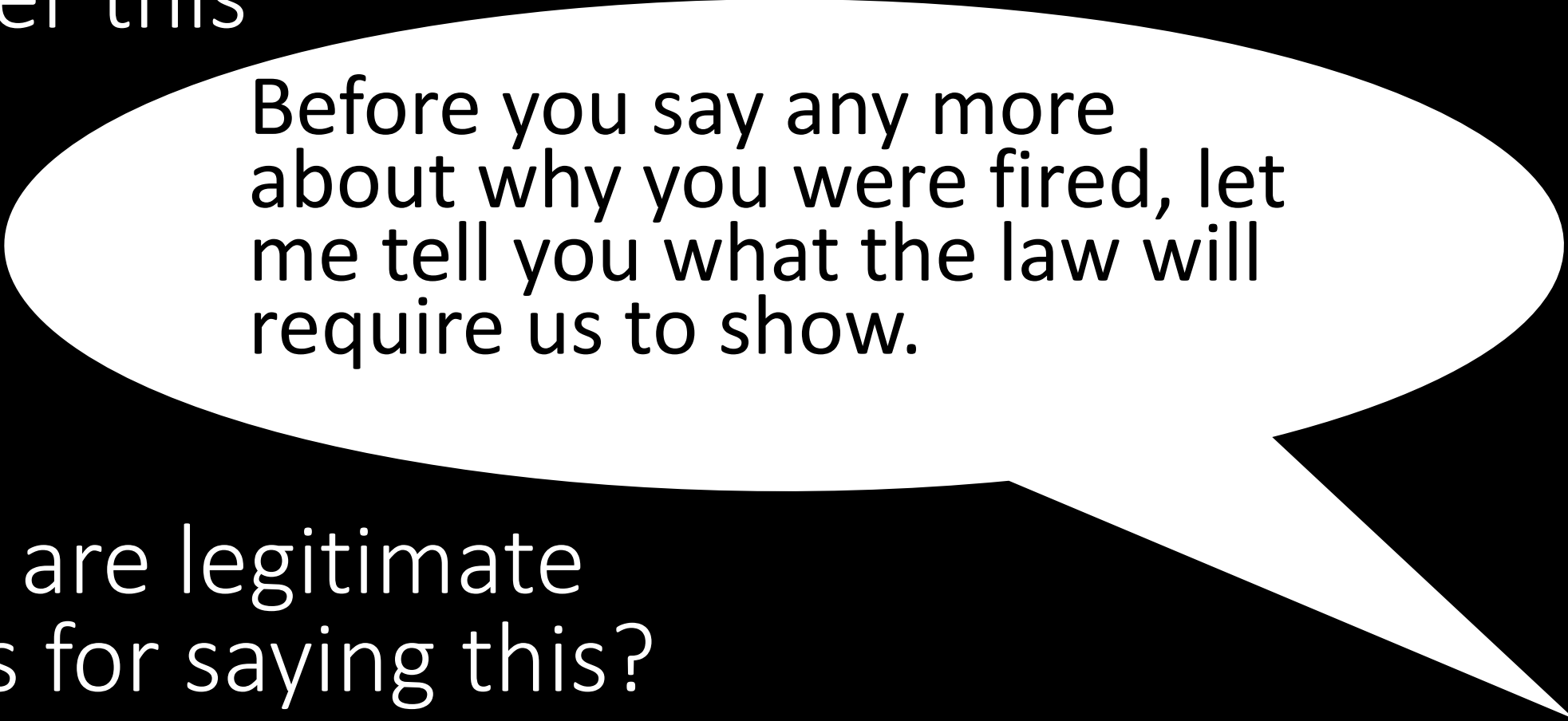
A lawyer's “duty is to extract the facts from the witness, not pour them into him.”

In re Eldridge, 82 N.Y. 161, 171 (1880)

According to the Restatement, witness preparation may also properly include:

“discussing the applicability of law to the events in issue; . . .”

Consider this



Before you say any more
about why you were fired, let
me tell you what the law will
require us to show.

What are legitimate
reasons for saying this?

Could this assist a client to testify falsely?

Cornell Law School says:

Whether the attorneys technique is proper depends in part on his motive and the client's motive. . . .

As long as the attorney in good faith does not believe that he or she is participating in the creation of false evidence, the attorney may resolve reasonable doubts in favor of the client and may explain the law before hearing the facts.

According to the Restatement, witness preparation may also properly include:

“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 ; . . .”

Could this ever run afoul of the ethics rules?

- In United States v. Massaoui, the government prosecuted the only perpetrator not killed in the 9/11 terrorist attacks.
- In sentencing, it came to light that a government prosecutor had provided witnesses transcripts of prior witness testimony.
- She had also sent e-mails advising them how to avoid the problems in earlier witnesses' testimony.



The problem?

- The judge saw this as a blatant violation of her witness sequestration order.
- The judge struck the “tainted” witnesses from testifying at sentencing.
- The defendant received life in prison, rather than a death sentence.

According to the Restatement, witness preparation may also properly include:

“reviewing the factual context into which the witness's observations or opinions will fit;”

“reviewing documents or other physical evidence that may be introduced; . . .”

According to the Restatement, witness preparation may also properly include:

“discussing probable lines of hostile cross-examination that the witness should be prepared to meet ; . . .”

Preparing a client to testify “truthfully”?

“[A]n attorney can, and should, critically examine a witness's testimony, discuss with the witness other relevant evidence, work to refresh the witness's recollection, and prepare the witness for questioning on direct and cross-examination.”

Ibarra v. Baker, 338 F. App'x 457, 465 (5th Cir. 2009)

“Coaching a witness to lie on the stand is one kind of egregious violation of professional ethics.”

In re Crossen, 450 Mass. 533, 576, 880 N.E.2d
352, 384 (2008)

“The bottom line is that virtually all witness preparation tactics—even those routinely utilized by lawyers—can raise ethical questions.

Timothy J. Miller, Matthew J. Singer, Ethical Limits on Witness Preparation, CBA Rec., September 2015, at 24, 26

“

What factors matter to the courts?

“Shaping” Recollections: What is proper?

- A bicyclist was involved in a collision with a truck.
- The truck driver had attempted to pass the truck.
- The truck driver gave an affidavit for a witness to the collision who had attempted to pass the truck.
- The witness to the collision never even saw the bicyclist.

AFFIDAVIT

Date _____ County: _____
Purpose: _____

PERSONALLY came and appeared before me, the undersigned Notary, the within named _____, who is a resident of _____ County, State of _____, and makes this his/her statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his/her knowledge:

(Insert Statement)

DATED this ____ day of _____, 20____

Signature of Affiant

SWORN to subscribed before me, this ____ day _____, 20____

NOTARY PUBLIC

My Commission Expires: _____

“Shaping” Recollections: What is proper?

- The lawyer responded, “we can change [the statement] now, or we can just leave [it] like that.”
- The **witness** did not object to leaving the statement as it was, but told the attorney that if he was later asked, he would deny that he saw the bicycle.
- Nonetheless, the attorney said it was appropriate to leave the statement in the affidavit, the **witness** signed it, and it was notarized.

Result?

- The court sanctioned the attorney, ordered him to pay plaintiffs fees and costs spent litigating the false affidavit issue, and disqualified the attorney and his law firm from further representing defendants in the case.

Knox v. Hayes, 933 F. Supp. 1573 (S.D. Ga. 1995)

“Shaping” Recollections: What is proper?

- Plaintiff's attorney conducted a series of interviews with a witness.
- After the last interview, the witness prepared an affidavit.
- The attorney's affidavit contained the witness's testimony, but the attorney did not make the witness believe that the statements were not made by the witness.
- They also instructed the witness to “very carefully” review the affidavit.

AFFIDAVIT

Date _____ County: _____

Purpose: _____

PERSONALLY came and appeared before me, the undersigned Notary, the within named _____, who is a resident of _____ County, State of _____, and makes this his/her statement and General Affidavit upon oath and affirmation of belief and personal knowledge that the following matters, facts and things set forth are true and correct to the best of his/her knowledge:

(Insert Statement)

DATED this ____ day of _____, 20____

Signature of Affiant

SWORN to subscribed before me, this ____ day _____, 20____

NOTARY PUBLIC

My Commission Expires: _____

“Shaping” Recollections: What is proper?

- The witness made several changes to the draft affidavit, and deleted certain facts of which she believed she did not have personal knowledge.
- The attorneys aggressively attempted to persuade her to include the facts in her affidavit by describing their understanding of the course of events and showing the witness independent evidence supporting their theories.

“Shaping” Recollections: What is proper?

- After the witness refused to alter her revisions to the affidavit, the attorneys prepared a final affidavit incorporating the witness's changes.
- Did the attorneys act unethically?
- NO, says the court.

Key distinction?

- Plaintiffs' attorneys "did not ask the **witness** to make statements that they knew were false; instead, they attempted to convince her to adopt statements that they believed were true."

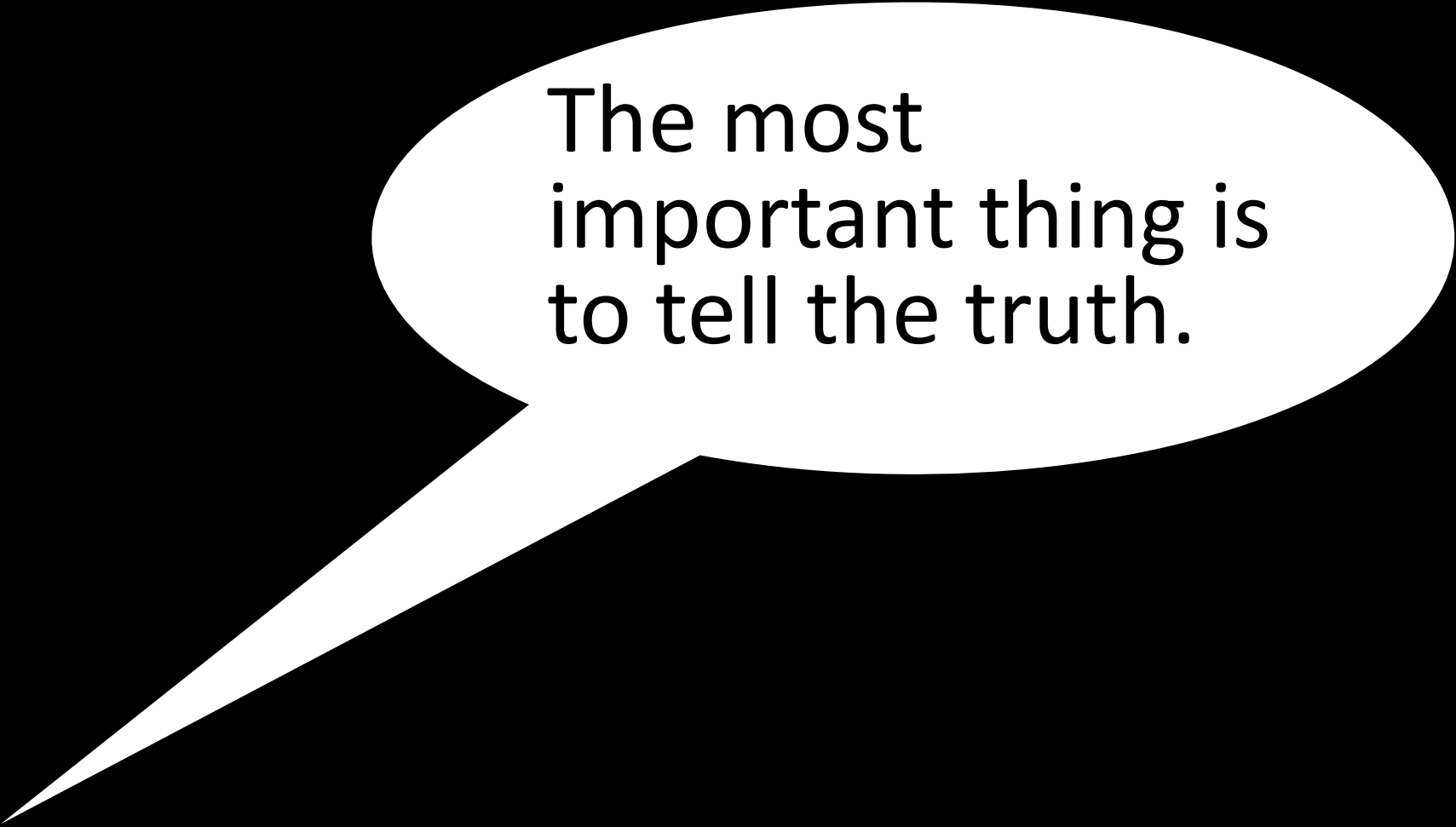
Resolution Trust Corp. v. Bright, 6 F.3d 336 (5th Cir. 1993) (no improper coaching)

“In *Resolution Trust*, the lawyers repeatedly emphasized that the **witness** must tell the truth, even while aggressively challenging the **witness's** perception of events and asking her to change the substance of her affidavit. The lawyers' emphasis on candor—even as they attempted to persuade the **witness** to make changes to her affidavit—was a key.”

“It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate.”

Resolution Tr. Corp. v. Bright, 6 F.3d 336, 341 (5th Cir. 1993)

What to say to the witness?



The most
important thing is
to tell the truth.

“The ethical concerns that some scholars have raised about these tactics . . . can be reduced by emphasizing to the witness the need to testify truthfully.”

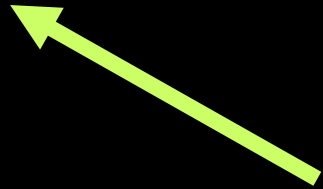
Timothy J. Miller, Matthew J. Singer, Ethical Limits on Witness Preparation, CBA Rec., September 2015, at 24, 28

An empty gesture?

Well-known study:

Witness is asked “Did you see the thin man in the blue suit?”

Witness is asked “Did you see a thin man in a blue suit?”



Witness more likely to answer “yes”.

“Small differences in the wording of questions can make large differences in a witness's responses.”

Richard C. Wydick, The Ethics of Witness Coaching,
17 Cardozo L. Rev. 1, 43 (1995)

Bottom Line:

“An attorney must not encourage a witness to lie, but an attorney generally ‘enjoys extensive leeway in preparing a witness to testify truthfully.’”

Ibarra v. Baker, 338 F. App'x 457, 465 (5th Cir. 2009)

What is the ordinary remedy if it appears that a witness has been “coached” to answer in a certain way?

CROSS-EXAMINATION

“The fact that she rehearsed her testimony is, of course, fair game on cross-examination.”

Lynch v. State, 13 A.3d 603, 606–07 (R.I. 2011)

Witness Testimony at Trial

Hypothetical?

- Your client is testifying at trial.
- The court has ordered a brief recess between direct and cross examination.
- Your client wants to ask you some questions about whether he was right about the facts in his direct testimony.
- Is it proper for you to speak with him?

Additional facts needed?

“It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed.”

Perry v. Leeke, 488 U.S. 272, 281–82 (1989)

What if there is no order?

A body of federal law says:

“During a civil trial, a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own.”

Hall v. Clifton Precision, a Div. of Litton Sys., Inc.,
150 F.R.D. 525, 528 (E.D. Pa. 1993)

Another consequence?

“[C]ommunications between the client and counsel during breaks in an ongoing [testimony], other than to discuss a privilege, are not privileged.”

Ngai v. Old Navy, No. CIV.A. 07-5653KSHPS, 2009 WL 2391282, at *4 (D.N.J. July 31, 2009)

Additional Issue in a Criminal Case?

Sixth Amendment Right to
Effective Assistance of Counsel

```
graph TD; A[Sixth Amendment Right to Effective Assistance of Counsel] --> B[Violated by directing attorney not to speak with client during 17-hour recess in testimony (Geders)]; A --> C[Not violated by bar on consulting with counsel during 15-minute recess (Perry v. Leeke)];
```

Violated by directing attorney
not to speak with client
during 17-hour recess in
testimony (Geders)

Not violated by bar on
consulting with counsel
during 15-minute recess
(Perry v. Leeke)

Except for prosecutors?

“In the case at hand, the trial justice's order [that the witness not discuss the case ‘with anybody’ during the recess] was not violated by the prosecutor discussing testimony with Dr. Cox during a break in his testimony.”

State v. Fry, 130 A.3d 812, 828–29 (R.I. 2016)

Privilege Issues Related to Witness Testimony

Is it proper to explain to a witness your theory
of the case?

What is the risk here?

“If the attorney discloses the strategy of the case to a nonparty witness, that information is discoverable, so the attorney should be wary of what he or she communicates to a nonparty witness.”

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, 393 (1987)

Sharing documents with witnesses

- You have prepared a memorandum of the interview you conducted a year ago with your key witness.
- You want to be sure the key witnesses remembers to testify to what he told you.
- You give him a copy of your memo to help prepare for his testimony.

Writing Used to Refresh Witness Recollection

“[A]n adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony.”

Fed. R. Evid. 612

Isn't the memo protected by work product?

“[W]hen materials protected by the work product doctrine are used by the examiner to refresh a witness's recollection . . . The protection afforded by the work product doctrine is waived and the opponent's attorney is entitled to inspect the writing.”

Com. v. O'Brien, 419 Mass. 470, 478, 645 N.E.2d 1170, 1175 (1995)

Bottom Line?