

PRESENTED AT

11th Annual Consumer Bankruptcy Practice

July 24 – 25, 2015
Galveston, Texas

Getting to the Truth of the Matter
from the Trenches

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Getting to the Truth of the Matter from the Trenches

Generally speaking, witness preparation is considered essential to proper preparation for trial. The duty to prepare a witness for trial is considered part of the duties of counsel, at least in this country. This is not the case elsewhere; in a number of countries it is not an accepted practice. In fact, in many countries the attorney never speaks with the witness outside of the courtroom. The international practices are, however, beyond the scope of this paper. Suffice it to say, practices can vary greatly depending on where the attorney practices. However, attorneys should and do prepare witnesses, and need to do so efficiently and within proper legal and ethical limits.

What we will deal with in this discussion is the line between witness preparation and witness manipulation, intimidation, and coaching. As is usually the case, there is a line, and the line appears to be clear: “don’t tell the witness to lie.” It is a simple proposition, but one with serious consequences.

General Prohibitions

Suborning perjury appears to be a fairly obvious prohibition. The attorney may not counsel the client to lie, nor may the attorney elicit testimony from the client or witness which the attorney knows to be false.

The Supreme Court, in *Nix v. Whiteside*, 475 U.S. 157 (1986), dealt with this issue in the context of a claim for ineffective assistance of counsel. The Court noted that the duty of loyalty and zealous representation of a client is limited to legitimate, lawful conduct compatible with the very nature of a trial. Stating further, “[A]t a minimum, an attorney’s first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.” See Model Rules of Professional Conduct, Rule 3.3, Comment; Wolfram, Client Perjury, 50 S. Cal. L. Rev. 809, 846 (1977). A statement directly on point is found in the commentary to the Model Rules of Professional Conduct under the heading “False Evidence”:

"When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed." Model Rules of Professional Conduct, Rule 3.3, Comment (1983) (emphasis added). *Nix* at 169.

The *Texas Rules of Professional Conduct* provide:

Rule 3.03 Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

5. Offer or use evidence that the lawyer knows to be false.

(b) If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall make a good faith effort to persuade the client to authorize the

lawyer to correct or withdraw the false evidence. If such efforts are unsuccessful, the lawyer shall take *reasonable* (emphasis added) remedial measures, including disclosure of the true facts.

The *Model Rules of Professional Conduct* provide:

Rule 3.3 Candor Toward The Tribunal

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

What we may do, or rather are required to do, is assist the client or witness in understanding of the meaning or application of the law to a given set of circumstances and fact. Model rule of professional conduct 1.2(d) provides:

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

Rule 3.4 Fairness To Opposing Party and Counsel:

A lawyer shall not:

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11th Annual Consumer Bankruptcy Practice session

"Evidence Skits: Direct and Cross Examination of Witnesses"