Commentary: Psychiatric Consultation on Witness Preparation

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"Give your evidence," said the King; "and don't be nervous, or I'll have you executed on the spot."—Lewis Carroll, *Alice's Adventures in Wonderland*

The witness's level of confidence about his ability to perform in a deposition or at trial is considered the primary factor affecting the witness's performance. The primary goal of witness preparation is to alleviate anxiety so the witness can focus on the substance of his answers.[1] Dr. Robert I. Simon discusses a role for the psychiatric expert in helping the lawyer prepare the client or witnesses to tell their story better. Witness development, as it is called, is a rather novel role for the psychiatrist, though in all fields lawyers consult with experts on technical matters.

As an ethical obligation, the lawyer is obliged to advise the witness to tell the truth. In preparing a witness for deposition or trial, the lawyer must do so in a way that does not constitute tampering with the witness. The lawyer does not want the witness to break down or be overwhelmed by anxiety so that his story can be told, but witness preparation can border on tampering with the witness. Theoretically, even dressing up a witness when it is not his usual attire can be cause for accusations of witness tampering. An instruction by the court to the jury states that in evaluating a witness, the demeanor of the witness can be considered.

In the novel *Anatomy of a Murder*, written by Robert Traver (actually, former Michigan Supreme Court Justice John D. Voelker) and made into a movie starring Jimmy Stewart playing the role of defense counsel Paul Biegler, the defendant is accused of murdering a man who allegedly raped the defendant's wife. Biegler gives his client, the defendant, what is known as "The Lecture," a review of the law of murder defenses. The review provides the foundation for the defendant's further account of the events, now shaped to provide the basis for an irresistible impulse or temporary insanity defense. At trial lawyer conferences, the *Anatomy of a Murder* situation is often used in discussions as an example of where to draw the line in determining when a comprehensive review of the law ethically provides the client with proper counseling and when it unethically provides the basis for false testimony.

Biegler says that,

> "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. Coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence, "The Lecture" is an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is a good practice to scowl and shrug here and add virtuously. "That's my duty, isn't it?" Verily the question, like expert lecturing, is unchallengeable.[2]

There are varying views on the propriety of "coaching" witnesses. *Pro:* "There is nothing unethical about an attorney making suggestions about the witness's wording as long as those suggestions do not encourage what the attorney knows or reasonably believes is false or misleading testimony."[3] *Con:* "It is

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not ethical to use role playing to 'script,' 'polish,' 'suggest wording,' or repeatedly 'rehearse' the witness's testimony."[4] *Cynical:* "A lawyer cannot tell his client to lie, or sit quietly if he does. But a lawyer can shape and mold and revise and cajole a witness into the party line."[5]

The prevailing view among litigators is captured by David H. Berg: "There are lawyers who refuse to woodshed witnesses at all, who just throw them up on the stand and let them tell their story." Berg continues, "Everyone who testifies has to be woodshedded. It is probably unethical to fail to prepare a witness, and it is undoubtedly cruel to subject anyone to cross-examination without preparation."[6]

Still, many lawyers (and witnesses) think there is something unsavory about scripting, polishing, and rehearsing. Their unarticulated premise seems to be that a witness's first and untutored expression of "their story" is pure Truth, and that any effort to refine that expression taints The Truth. Of course, as the saying goes, nothing could be further from the truth. First, past events are not indelibly and unerringly recorded in the mind, subject to recall on demand. Recall is a creative process. Second, even a witness with detailed and complete memory profits from educated and experienced advice on what remembered facts are relevant and how to present those facts clearly, logically, and persuasively. Such preparation, it is said, serves that truth and is an ethical component of zealous advocacy.[7]

Witness preparation also is designed to help the witness cope with cross-examination, which is often unnerving. Cross-examination is designed to put the witness under stress. Supposedly, putting the witness under stress is the way to reach the truth. John Wigmore, the leading authority on the law of evidence, called cross-examination "one of the principal and most efficacious tests which the law has devised for the discovery of truth." The idea has gained currency in the literature: In *The Caine Mutiny*, cross-examination causes Captain Queeg to fall apart and reveal his mental instability; and in *Witness for the Prosecution*, cross-examination wrings a confession from the defendant's wife that she has been lying to frame her husband.

In various countries the witness tells his story, not by question and answer, and the witness stands (hence the expression "the witness stand"); whereas, in the Anglo-American system, the witness sits but is subjected to an often vigorous cross-examination. The following are titles of chapters in a book on cross-examination: "Break Your Witness," "Witness on the Run," "Setting Traps for Opposing Counsel," "The Kill," "Use of Humor," "Rephrasing for Dramatic Impact," "Flattery Technique," and "Reducing the Testimony of a Physician."[8]

In his thought-provoking essay, Dr. Simon writes about the role of the psychiatrist consulting with the attorney without seeing the client or witness—it is not a road much traveled. A psychiatrist might go over a deposition with the attorney, might look at a day-in-the-life film of an individual claiming injury, or might advise the attorney on how to cross-examine a plaintiff who is a paraplegic as the result of the accident. The expert may also serve as a consultant during the trial as well as before trial. The rule on exclusion (sequestration) of witnesses from the courtroom so as to reduce the chances of fabrication or collusion of witnesses has an exception for a person whose presence is shown to be essential to the attorney for the presentation of the case.[9]

More often than not, the attorney wants the psychiatrist to deal directly with the witness rather than through him. A number of therapists have group therapy sessions for physicians facing litigation.[10]

Liability insurance coverage is aimed at providing protection and alleviating anxiety. A recent full two-page advertisement by the American International Group (AIG) in the *New York Times* stated in large letters, "You're alone on the stand. Will your insurer be standing by you?"[11] But even with the insurance, there is worry that when push comes to shove, there may not be coverage or that liability will exceed coverage. What often happens is that many lawyers put pressure on a defendant to settle by making a large demand (often called a prayer) and it gets headlines—"$20-million lawsuit!" Notwithstanding the assurance of their attorney, defendants have restless nights thinking that the lawsuit will end in a judgment far beyond coverage. It is unnerving. One insurance company study shows that malpractice litigation places physicians at increased risk for a second litigation-producing incident within a short time.[12]

Sometimes a therapist will have a patient who in the course of therapy becomes a party in litigation. For example, the patient may become involved in a child custody proceeding. The patient may want the therapist to testify on the patient's behalf and to provide support during the trial, or the therapist may have a patient who, becoming a party or witness,

needs medication because of anxiety brought about by the litigation.

Different witnesses need different supports. In a sexual harassment case, the claimant brought her snarling German police dog. The judge ordered the dog out of the courtroom.

Gary Gilmore, the Utah killer, wanted his girlfriend to be in the courtroom when he testified. In the book, *The Executioner's Song*, Norman Mailer describes Gilmore's inability to testify without the support of his girlfriend. He wanted not medication, not a psychiatrist, but his girlfriend to be there. The prosecutor did not want her in the courtroom. The court (after much deliberation) allowed her to be present.

In the case of young children as witnesses, various states have enacted legislation to allow a support person to sit with or in close proximity to the witness.[13] The various states too have approved the use of videotaped interviews as an alternative to trial testimony for youngsters involved in child protective proceedings. "Anatomically correct dolls" may be used to clarify the child witness's explanation of events and to ensure a common understanding between the witness and trier of fact as to the events that took place.

Under the headline, "Witness faints at mention of sex," the *New York Times* reported a Cincinnati woman who suffered from an affliction in which the individual collapses at the mention of a word or group of words.[14] At trial, sitting in the witness chair, she immediately fell out of the chair when sex was mentioned. In the circumstances surrounding the case, a neighbor, the defendant in the case, evidently learned of the woman's condition, whispered the word "sex" to her as she was passing through the lobby of the apartment where they lived. She dropped, unconscious to the floor, and he sexually molested her after moving her to a more private place. The trial of the neighbor was difficult to prosecute because every time she was called to testify, she fainted, even if the prosecutor so much as spelled the word "s-e-x." Ameslan might have been employed or the woman could have been asked to demonstrate what took place using dolls, as is done when asking children to testify.

In the South, in days gone by, lynching took place in rape cases to avoid putting the complainant on the stand, embarrassing her. The alternative was to hold the trial in a closed session. To this day, the name of a victim in a rape case is not mentioned in the press because it would stigmatize. Other trials are sometimes televised, often to the anguish of witnesses.

Hypnosis, like medication, is a way to relieve anxiety or to render a witness more confident and better able to sustain the rigors of cross-examination. In the trial of Clay Shaw, alleged to be a participant in the assassination of President Kennedy, every morning before the testimony of the principal witness, Perry Russo, District Attorney Jim Garrison had the medical examiner hypnotize Russo. The defense had no idea that was going on. The purpose allegedly was not to tamper with the witness, not to have the witness say something different, but to have the witness appear in a confident way, and everybody knows that juries give more credibility to a witness who testifies with confidence. (For a time I was senior district attorney under Jim Garrison but took no part in the case.)

Was it ethical for Jim Garrison to have his principal witness hypnotized? Dr. Martin Orne and Dr. Bernard Diamond have argued that a witness who has been hypnotized should not be allowed to testify, not because of any suggestions, but because of the fact that once a witness has been hypnotized, the adversary is deprived of the opportunity to cross-examine effectively. In *People v. Shirley*,[15] the California Supreme Court accepted that argument and a number of states have followed it. Under that ruling, a witness, hypnotized for whatever reason, for therapy or to relieve anxiety, is polluted and cannot testify, not even in a rape case. Other states have guidelines on hypnotically refreshed testimony.[16] (California by legislation has modified its exclusionary rule.) In *Rock v. Arkansas*,[17] the U.S. Supreme Court held that a defendant who has been hypnotized has a constitutional right to testify whether or not he has been hypnotized.

The issue of competency to stand trial of an accused in a criminal case raises the question of "chemical competency." At one time the idea was that a defendant not competent to stand trial without medication should not be out on the street.[18] No longer does he have to be competent "*au naturel*." In *Riggins v. Nevada*,[19] the U.S. Supreme Court discussed the propriety of forcibly medicating a criminal defendant to achieve competency, but it focused on the effect of overmedication on a defendant's ability to assist at trial. Although Riggins initially agreed to take the medication, as trial approached defense counsel asked that it be discontinued, arguing that it

would affect his demeanor during trial and deny him the right to show his true mental state. He had entered a plea of not guilty by reason of insanity. After hearing testimony of four physicians, the trial court denied permission to stop the medication. The defendant presented his insanity defense and testified; he was permitted to offer expert testimony describing his demeanor while unmedicated. He was convicted and sentenced to death. The Supreme Court found that the record did not show that the "treatment with antipsychotic medication was medically appropriate and, considering less intrusive alternatives, essential for the sake of Riggins' own safety or the safety of others." The Court went on to say, "We . . . are persuaded that allowing Riggins to present expert testimony about the effect of Mellaril on his demeanor did nothing to cure the possibility that the substance of his own testimony, his interaction with counsel, or his comprehension at trial were compromised by forced administration of Mellaril." Because the trial court had not developed the effect of the medication in these respects, the Court remanded the case for determination of whether Riggins suffered actual prejudice.

There are other instances when breakdown of a party or witness may enhance the allegations of that party. In a recent case in Michigan's Macomb County, Sheriff William H. Hackel was on trial for rape. He and a member of his staff went to an out-of-town conference. During the course of the conference, he invited her to his room. They watched television, and then, she claimed, a few hours later he raped her. He contended that the sex was consensual. To support his contention he pointed out that after the sex, they had sandwiches. On the witness stand, she broke down and cried. Just about everybody opined that her crying is what convinced the jury to return a guilty verdict. In that type of case, the complainant's loss of composure was the most effective way of testifying.

Then too, some attorneys do not depend very much on witnesses. For example, Geoffrey Fieger gets multimillion judgments by his dramatic behavior in the courtroom. For him, the witness is like the oyster that carries the sauce. He studied acting in college. As Shakespeare in *Love's Labor Lost* would say, "He draweth out the thread of his verbosity finer than the staple of his argument."

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