Witness Preparation

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Witness Preparation

John S. Applegate*

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Mr. Liman. [Y]ou are looking at a book there. What is the book, sir?

Mr. North. The book is made up of notes that I have made in trying to prepare with counsel for this hearing.

.....

Mr. Sullivan. Don’t tell him what it includes.

Mr. Liman. Well, I think that if a witness is looking at something that I, as counsel, am entitled to see what he is refreshing his recollection with.

Mr. Sullivan. I think you are wrong. That is a product of lawyers working with clients.

.....

... That is none of your business .... 1

I. The Witness-Preparation Problem

A. Introduction

Witness preparation is any communication between a lawyer and a prospective witness—client or non-client, friendly or hostile—that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing. Witness preparation enables lawyers to present witnesses who are thoroughly familiar with the subject matter of their testimony and who are prepared to say what they know in a clear, coherent manner.2 American litigators regularly use witness prepara-


2. See, e.g., R. ARON & J. ROSNER, HOW TO PREPARE WITNESSES FOR TRIAL 82 (1985) (describing witness preparation as "the most important aspect of trial advocacy"); id. at 309-10 (not-
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...tion, and virtually all would, upon reflection, consider it a fundamental duty of representation and a basic element of effective advocacy.

At the same time, for many other lawyers and most nonlawyers, witness preparation represents the worst qualities of the legal system. Because witness preparation is ordinarily conducted in private, it is difficult for the lawyer and witness to avoid the appearance that they have invented a convenient story for the jury. In fact, the temptation to invent or embellish a story can be very strong. Moreover, the line between preparing and prompting (or "coaching," the usual term of opprobrium) is rarely clear even for the most scrupulous. Even though witness preparation occurs in practically every lawsuit, it is almost never taught in law school, not directly regulated, seldom discussed in scholarly literature, and rarely litigated. Witness preparation is treated as one of the dark secrets of the legal profession. The resulting lack of rules, guidelines, and scholarship has created significant uncertainty about the permissible types and methods of witness preparation.

Ten years ago, the District of Columbia Bar, in an attempt to eliminate some of this uncertainty, issued an ethics opinion concerning the appropriate role of lawyers in preparing witnesses. The opinion asserted that detailed, substantive consultations between lawyers and prospective witnesses are an expected part of trial preparation. Furthermore, it concluded that a lawyer's suggesting actual language to be used by a witness may be appropriate, as long as the ultimate testimony remains truthful and is not misleading. An editorial in the National Law Journal praised...
Opinion No. 79 for "affirm[ing] the real-world practices most lawyers follow." But the editorial criticized the opinion's failure to give lawyers clear guidance for preparing witnesses: "What bothers us, however, is how little lawyers are told about the do's and don'ts of witness preparation. . . . There is a need for specific guidelines." It is a measure of the uncertainty dominating witness preparation that Opinion No. 79 remains the only authoritative source that even attempts to discuss the subject comprehensively.

The doctrinal uncertainties in witness preparation often result in misunderstandings in the application of legal rules to particular witness-preparation practices. In Berkey Photo, Inc. v. Eastman Kodak Co., the court took the unusual step of allowing nondisclosure of work-product material used in witness preparation even though the court believed that the lawyer had clearly waived any privilege that protected the material from disclosure. Judge Frankel explained:

[G]iven the current development of the law in this quarter, it seems fair to say that counsel were not vividly aware of the potential for a stark choice between withholding the notebooks from the experts or turning them over to opposing counsel.

Judge Frankel ruled prospectively that disclosure would ordinarily be required.

Practitioners themselves are partially responsible for the lack of rules and guidelines. Faced with the considerable inconveniences of conducting their own witness preparation in public, lawyers seem satisfied to leave each other's preparation alone. Without litigation, there is little judicial authority on the subject. This uncertain state of affairs is perpet-

8. Id.
10. See id. at 616-17.
11. Id. at 617. Professor Saltzburg has also recognized this uncertainty. See Saltzburg, Lawyers, Clients, and the Adversary System, 37 MERCER L. REV. 647, 650, 687 (1986) (asserting that development of acceptable standards of behavior is difficult because the legal community has been unable to clearly identify the premises of the adversarial system).
12. One is tempted to postulate that there is a tacit understanding among civil trial lawyers that they will not look too deeply into each other's witness preparation. The practical literature makes clear that preparation activities are ordinarily left untouched by discovery. See, e.g., Frampton, Some Practical and Ethical Problems of Prosecuting Public Officials, 36 MD. L. REV. 5, 33 (1976) (noting that witness preparation is "customarily . . . a one-on-one process"); Herndon & Karl, Demonstration: Preparation of a Witness to Testify, 47 ANTITRUST L.J. 123, 140 (1978) (stating that the prosecution did not inquire into the defendant's witness preparation); see also United States v. Jones, 542 F.2d 186, 208-10 (4th Cir. 1976) (noting that ordinarily counsel will want to and is entitled to interview nonclient witnesses privately); R. Aron & J. Rosner, supra note 2, at 357-58 (implying that lawyers are not concerned about discovery of witness preparation unless they keep a written record of the interview). Moreover, most trial manuals do not include detailed questioning about witness preparation in basic deposition outlines or checklists, a striking omission because preparation is at the heart of the suggested questioning of expert witnesses. Compare S. Baldwin, F. Hare
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uated because most lawyers would rather tolerate doctrinal uncertainty than risk litigation.

Witness preparation is also permeated by ethical uncertainty. It presents one of the most difficult ethical dilemmas regularly encountered by lawyers. The previously quoted exchange from the Iran-Contra Hearings of three summers ago is part of a rare public appearance of witness preparation. It displays in high relief the tension between Mr. Sullivan's confidential relationship with his client and Mr. Liman's thorough factual investigation, both of which represent fundamental aspects of the adversary system. Any attempt to eliminate the doctrinal uncertainty that dominates the area of witness preparation must fully consider the competing goals of partisan representation and truth seeking that are present in the adversarial system of justice.

This Article attempts to fill the need for a comprehensive picture of the doctrinal and ethical problems of witness preparation in civil litigation. In addition, the Article develops a framework for resolving disputes arising out of this problematic component of the American justice system. The Article approaches the problem in four stages.

Part I illustrates the basic problems and tensions in this area, using examples from the Iran-Contra Hearings. Part II discusses current witness preparation practices through an analysis of the types of witnesses a lawyer prepares and the various techniques a lawyer employs to develop witness testimony. The Article describes the various rules and doctrines that govern this area of trial preparation, demonstrating the complexity and uncertainty of the law in this area.


My own experience in practice tends to confirm the suggestion that trial lawyers have a tacit understanding that preparation activities are protected. Experienced litigators prepare witnesses with little apparent thought of waiver problems. Instead, they simply instruct witnesses not to answer substantive questions about their preparation beyond the fact that it occurred.

13. The most thorough and explicit treatments of witness preparation are found in the immense body of literature directed toward practitioners and usually written by practitioners. The best of the practical literature is helpful, informative, and sensitive to the complex legal and ethical issues that witness preparation presents. See, e.g., G. Bellow & B. Moulton, The Lawyering Process: Preparing and Presenting the Case 357-58 (1981). More typically, however, this literature tends to resolve complexity or ambiguity with conclusory advice. See, e.g., Kornblum, supra note 3, at 12; McElhaney, Horse-Shedding the Witness, Trial, Oct. 1987, at 80, 84. In addition, the literature is often unrealistically confident that honest lawyers will instinctively be able to find the way through this tangled forest. See, e.g., Berg, supra note 2, at 58; Summit, The Witness Needs Help, in The Litigation Manual, at 497, 500 (J. Koeltl 2d ed. 1989). A more troubling phenomenon is a win-at-all-costs perspective that encourages—in more or less badly disguised ways—plainly unethical practices. The academic literature, in contrast, focuses on important parts of the witness preparation problem—the psychology of perception, adversarial roles, ethical duties, and evidentiary rules—but leaves the forest for practitioners to describe.

14. Uncertainty exists in part because doctrinal analysis of witness preparation is commonly thought to involve only one legal rule—the lawyer's ethical duty not to present or participate in the
Part III shows that witness preparation sits squarely astride two very different conceptions of the adversary system itself and of the roles of lawyers within it. The basic structure of adversarial justice necessitates witness preparation, but witness preparation can also have a distorting effect on the accuracy of testimony. The possibility of distortion interferes with the judicial system's attempt to reach the truth. The doctrinal ambivalence and resulting uncertainty described in Part II, therefore, are ultimately understood as manifestations of a deeper conflict within the adversary system itself.

The Article suggests in Part IV that the best way to cope with witness preparation is to recognize the awkward position it holds in the adversary system and to address the problem directly in witness-preparation disputes. Because witness preparation can undermine the important truth-seeking function of trials, it should not be encouraged without qualification. This Article suggests that the appropriateness of any witness-preparation technique should depend on whether the structure of the adversary system requires such a technique in the particular context in which it is employed.

B. An Illustration: The Iran-Contra Hearings

Witness preparation poses serious difficulties for litigators trying to steer an appropriate course between their duties to their clients and their duties to the tribunal and to the judicial system as a whole. The recent congressional hearings concerning America's support of rebel forces in Nicaragua with profits diverted from the sale of arms to Iran, the so-called Iran-Contra Affair, provide a rare opportunity to explore this dilemma in a concrete setting.\(^\text{15}\)

creation of false evidence. See, e.g., Op. No. 79, supra note 5 ("[A] lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading."); M. Freedman, Lawyers' Ethics in an Adversary System 59-77 (1975) (discussing the problem of giving advice that might induce the client to commit perjury); C. Wolfram, Modern Legal Ethics 648 (1986) ("[A] lawyer may not assist . . . a witness in twisting or distorting . . . the truth . . . ."). In fact, many legal rules apply, as Part II of the Article demonstrates.

15. A congressional hearing is not, of course, the ideal setting in which to discuss the legal rules that govern civil trials. A congressional hearing does not consist of two adverse parties presenting a case to a genuinely neutral tribunal. Also, the procedural and evidentiary rules governing a congressional proceeding differ significantly from those used in a civil trial. Therefore, the analogy must be treated with some diffidence.

Nevertheless, for illustrative purposes, the similarities outweigh the differences. The Iran-Contra Hearings had criminal implications, and the tone set by Liman and Sullivan was unmistakably adversarial. True, the statements of Colonel North in the Hearings could not be used against him in any criminal proceedings because he received a grant of immunity in exchange for his testimony. Yet North and Sullivan were attempting to make a favorable impression on the public. Unlike other witnesses in other congressional hearings, North's testimony was not scripted or reviewed before the hearing; therefore, North did not know with certainty what areas the committee would explore or
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The hub of this intrigue was a previously little-known member of the National Security Council staff, Lieutenant Colonel Oliver L. North. Between the public disclosure of the diversion of funds on November 25, 1986, and North's congressional testimony in early July of 1987, North was dismissed from his White House position, an independent counsel commenced a criminal investigation into the activities of North and others, North retained Brendan V. Sullivan, Jr., as his own counsel, and North asserted his fifth amendment privilege against self-incrimination in response to a request that he testify before the special House and Senate committees investigating the Iran-Contra matter. For their part, the committees hired experienced litigators, Arthur L. Liman for the Senate and John W. Nields, Jr., for the House, to manage the investigation. Congress subsequently granted immunity to North in exchange for his testimony at the hearings.

The public eagerly awaited North's appearance before the committees, and the predicted fireworks began promptly at the outset of North's testimony. Sullivan opened by complaining to the Senate chairman, Senator Daniel K. Inouye, that he had been unable to prepare North adequately for his testimony because the committee failed to provide many documents until a few days before the hearing. Most viewers, sharing the common belief that an honest witness simply takes an oath and testifies, were probably surprised to hear Sullivan say that North "cannot be expected to accurately recall all of the facts" or to give "complete and accurate testimony" without extensive consultations with counsel. In fact, Sullivan was absolutely correct. A witness cannot accurately testify about matters "related to years of intensive work" without extensive witness preparation including the review, with counsel, of all "the relevant

what specific questions would be asked. Moreover, as an arbiter of conflicts between Liman and Sullivan, Chairman Daniel Inouye played a procedural role resembling that of a judge.

In addition, while Congress is not bound by judicial rules of evidence or common-law privileges that govern trials, it has generally sought to avoid tests of privilege and in practice respects these rules and privileges. See Millet, The Applicability of Evidentiary Privileges for Confidential Communications Before Congress, 21 J. MARSHALL L. REV. 309, 311-12, 317 (1988). Most importantly, the exchange between Liman and Sullivan was a debate between lawyers to a tribunal of lawyers. The rhetoric and thought processes of all the active participants were those commonly employed by lawyers in the courtroom. During the lengthy debate about privilege, no one suggested that congressional rules were different from those applied in civil trials.

This Article relies exclusively on public knowledge of the Iran-Contra investigation. Therefore, any assumptions about the actors' motives or their prehearing activities are inferences only and should be considered strictly hypothetical.

16. Sullivan's complaints were apparently somewhat disingenuous. Chairman Inouye pointed out that Sullivan himself had proposed a simultaneous exchange of documents five days before the hearing. In addition, it was Sullivan who had requested the July 7 starting date, despite the committee's desire to begin later. See Iran-Contra Hearings, supra note 1, at 3-5.

17. Id. at 4.
materials well in advance." There is no reason to doubt Sullivan's claim that this was the first time he had ever represented a client without being able to review all the relevant documents well in advance of the hearing.

The committees' attention returned to witness preparation two days later. During questioning by chief Senate counsel Liman concerning events of the previous year, North consulted Sullivan before answering, a frequent occurrence throughout North's testimony. North and Sullivan then selected a black loose-leaf binder in front of them on the witness table, opened it, and perused a document inside it. The following ensued:

Mr. Liman. [Y]ou are looking at a book there. What is the book, sir?

Mr. North. The book is made up of notes that I have made in trying to prepare with counsel for this hearing. And I have been asked questions that covered 5-1/2 years of work, many of the days in which were non-stop. I am trying to give you honest, straight-forward and factual and complete answers.

Under the rules of evidence, opposing counsel is entitled to review any writing used by a witness during testimony to refresh recollection, so that counsel can test the existence, certainty, and accuracy of the witness's memory. Liman continued:

Mr. Liman. And—

Mr. North. It includes—

Mr. Sullivan. Don't tell him what it includes.

Mr. Liman. Well, I think that if a witness is looking at something that I, as counsel, am entitled to see what he is refreshing his recollection with.

Mr. Sullivan. I think you are wrong. That is a product of lawyers working with clients.

Mr. Liman. And you think that a witness is entitled to read something and that we are not entitled to see what he is reading?

Mr. Sullivan. He is entitled to read his notes and preserve the attorney-client privilege. Everything in that book is a product of the attorney-client, and the work-product privilege, Mr. Liman, and you know that.

Sullivan had quickly capitalized on North's legally adroit characterization of the contents of the notebook as the product of "trying to prepare

18. Id.
19. Id.
20. Id. at 237-38.
21. See infra note 196 and accompanying text.
22. See Iran-Contra Hearings, supra note 1, at 238.
with counsel.” This characterization—itself undoubtedly the result of careful preparation by Sullivan—laid the foundation for Sullivan to claim that the document itself might have been privileged because it reflected either communications between lawyer and client or the thoughts and impressions of the lawyer regarding the conduct of the case. The notebooks also probably contained a collection of some, but not all, of the documents provided to North by the committees. Sullivan, in consultation with North, had deemed these documents relevant and important. The process of selection, therefore, constituted protected work product.

Liman countered that North had waived those privileges by relying on the documents. Liman then attempted to establish the foundational requirements for disclosure of materials used to refresh recollection.

Mr. Liman. Are you [North] able to recall your conversation with Admiral Poindexter on the 21st about the diversion without looking at that book?

But Sullivan—apparently concerned that he had permitted North to waive the secrecy of the notebooks by consulting them in formulating an answer—intervened and flatly refused to let North answer any further questions.

Mr. Sullivan. That is none of your business either. You just ask him the question.

. . . .

. . . get off his back.

. . .

Mr. North. Counsel [Liman], I would—

Mr. Sullivan. Don’t answer the question. Next question. The question, Mr. Chairman, won’t be answered.

Senator Inouye did not intervene, and Liman did not ask him to intervene. Instead, Liman moved on to other questions, and apparently no one pursued the matter any further. Shortly afterwards, however, Chairman Inouye ordered disclosure of similar material under somewhat different circumstances.

23. *All* the documents provided by the committee comprised a pile taller than North. *Id.* at 4. Any documents provided by North himself would have enlarged that stack. It did not appear from news photographs that North had that many binders with him.


26. *Iran-Contra Hearings, supra* note 1, at 238.

27. *Id.*


29. Liman had asked North to consult one of the notebooks. Sullivan objected, at length, that only the witness could decide whether to consult his notes to refresh his memory. Senator Inouye decided that Liman’s question was proper, but he let North and Sullivan choose whether to use the
Three aspects of the Liman-Sullivan exchange are worth noting. First, a highly competent and experienced criminal defense lawyer like Sullivan allowed his client to risk waiving the secrecy of witness preparation. Second, an equally competent and experienced litigator like Liman failed to seize the opportunity, letting Sullivan, in effect, get away with this mistake. It seems clear that Sullivan genuinely believed that his preparation with North was “none of [Liman’s] business” and that Liman did not on the whole disagree. Third, and perhaps as a result, their disagreement was inconclusive. This brief altercation between Sullivan and Liman illustrates the doctrinal complexity and uncertainty that surrounds witness preparation. Part II details the problems lawyers frequently encounter when preparing witnesses and discusses the various rules that govern this aspect of a lawyer’s duties.

II. Witness Preparation in Practice

There are two legally significant characteristics of a given witness-preparation situation: the role of the witness and the witness-preparation technique. The role of the witness determines the application of privileges and ethical duties. The preparation technique implicates procedural and evidentiary rules. This Article pairs witness roles and preparation techniques with particular ethical standards and legal rules to illustrate the complex considerations involved in witness preparation. This pairing is merely for convenience and clarity. Plainly, each witness role and each preparation technique would actually implicate several different legal and ethical considerations.

A. Witness Roles

1. Clients: Lawyer Competence and Zealousness.—Litigators must be competent to handle their clients’ cases. Lawyers are ethically required to prepare adequately and to represent their clients “zealously within the bounds of the law.” The American Bar Association’s Model Notes. See Iran-Contra Hearings, supra note 1, at 239-40. A few minutes later, Sullivan again raised the witness-preparation objection to another of Liman’s questions. Chairman Inouye supported Liman in his insistence on a response, and North answered the question. See id. at 240-41. When North claimed not to recall what he had reviewed, however, he was not asked to produce his notes or notebooks of documents. See id.

30. See infra notes 32-94 and accompanying text.

31. See infra notes 95-242 and accompanying text. A third characteristic, testimonial setting, is occasionally important (though to a much lesser extent), because the rules of evidence were designed for trials as opposed to pretrial testimony. Preparing witnesses for deposition and preparing witnesses for trial, however, are generally viewed as equally important, and the same practices apply.


Code of Professional Responsibility does not speak explicitly of witness preparation, but it makes clear that factual preparation of the case is essential. In the context of professional competence, the Code directs lawyers to undertake representation only with “preparation adequate in the circumstances.”

A similar requirement in the Federal Rules of Civil Procedure is that attorneys make a reasonable investigation of the facts alleged in their pleadings. This task normally includes reviewing with the client the matters to be covered, anticipating specific questions that may be asked on direct or cross-examination, and reviewing important documents to familiarize or refamiliarize the client with them.

The obligation to prepare adequately does not end with the preparation of the client who testifies. A full investigation of the facts is part of a lawyer’s duty to a client. The lawyer must contact and prepare other witnesses. Judge Keeton explains:

[If you prepare your case properly you will not call a witness to the stand without having asked the witness what his testimony will be on all points as to which you can anticipate he may be questioned.]

The practical literature uniformly views the failure to interview witnesses prior to testimony as a combination of strategic lunacy and gross negligi...
A lawyer who does not prepare all witnesses is "derelict in his professional duties."39

The case law detailing the sixth amendment right to effective assistance of counsel provides additional insight into the need for effective preparation.40 Criminal representation may be ineffective if the lawyer fails to make adequate investigation into the facts of the case.41 The Supreme Court has held that legal assistance is ineffective if counsel is not given a reasonable amount of time to prepare for trial.42 A client's right to effective assistance of counsel also includes conferences with counsel before and during the trial. The Court has expressly recognized that these conferences can involve witness preparation.43

There is another dimension to client preparation. Even if the client-witness is not a party, the lawyer must represent the client as a witness. Some prior conferences are almost always necessary,44 if only to help calm and relax the witness.45 Whether or not a witness has a stake in the case, counsel cannot be expected to adequately represent the client without an opportunity to confer with counsel before testifying.

38. See, e.g., Berg, supra note 2, at 14 ( remarking that "it is probably unethical to fail to prepare a witness").
40. The Supreme Court has consistently recognized the need for "the guiding hand of counsel at every step of the proceedings," Powell v. Alabama, 287 U.S. 45, 69 (1932), because legal skill is crucial even in apparently simple cases. See Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). This principle is equally true in civil and criminal matters. The only differences are the higher stakes of criminal prosecutions and the criminal defendant's constitutional right to counsel.
41. See Strickland v. Washington, 466 U.S. 668, 691 (1984); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standards 4-4.1, 4-4.3(a), (d) (1982).
42. See Powell, 287 U.S. at 53. But see United States v. Cronic, 466 U.S. 648, 660-62 (1984) (limiting presumption of ineffective assistance to extreme cases in which counsel was not given any opportunity to prepare).
43. See Geders v. United States, 425 U.S. 80, 88-91 (1976); see also Crutchfield v. Wainwright, 803 F.2d 1103, 1119 (11th Cir. 1986), cert. denied sub nom. Crutchfield v. Dugger, 483 U.S. 1008 (1987) (Edmondson, J., concurring) ("[T]here is nothing unethical or, otherwise, wrong with lawyers counseling their clients at every recess concerning the anticipated direction of the prosecutor's questions and the best manner in which the client can present the facts most favorably to the defense. To the contrary, such counseling is entirely proper."); United States v. Conway, 632 F.2d 641, 645 (5th Cir. 1980) ("[W]e hold that depriving a criminal defendant of the right to consult with counsel during court recesses—regardless of how brief the recesses may be—violates the constitutional right to effective assistance of counsel."). But see Perry v. Leeke, 109 S. Ct. 594, 601 (1989) (holding that a witness has no right to meet with counsel during a brief recess between defendant's direct examination and plaintiff's cross-examination); People v. Pendleton, 75 Ill. App. 3d 570, 595, 394 N.E.2d 496, 507 (1979) (disapproving of a prosecutor's discussions with a prosecution witness during a weekend recess).
44. See Parnell, The Effective Use of Corporate Witnesses, THE BRIEF, Spring 1988, at 53, 55; Summit, supra note 13, at 497.
45. See, e.g., Perry, 109 S. Ct. at 606 (Marshall, J., dissenting) (asserting that "a few soothing words from counsel to the agitated or nervous defendant facing the awesome power of the state might increase the likelihood that the defendant will state the truth on cross-examination"); Thompson v. State, 507 So. 2d 1074, 1075 (Fla. 1987) (holding that denying the defendant the opportunity to consult with counsel during a recess from cross-examination was unconstitutional because the denial left the defendant "nervous, confused, and may have contributed to his performance on cross-examination"); People v. McGuirk, 106 Ill. App. 2d 266, 276, 245 N.E.2d 917, 922, cert. denied, 396 U.S. 972 (1969) ("It is particularly advisable in a sex case to prepare a prosecutrix for the ordeal she
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outcome of the case, a lawyer should protect the witness from appearing unnecessarily dishonest, venal, incompetent, graceless, or unintelligent. Consider North's position in the Iran-Contra hearings. Immunity shielded him from prosecution for what he told the committees, but he had an extremely strong interest in making a favorable impression.46 Sullivan was responsible, in some part, for helping North achieve that goal.

The obligation to prepare, in sum, is clear from the duties of competence and zealousness, however, the extent of that obligation is not clear. "Within the bounds of the law" inevitably pulls the lawyer in the opposite direction.47 The greatest uncertainty in this respect exists when preparation may encourage a client to commit perjury.48

2. Friendly Witnesses: The Scope of the Attorney-Client and Work-Product Privileges.—In a case of any complexity, a lawyer ordinarily relies on a cadre of friendly witnesses, including the client, to build the case. To present the case in a clear, persuasive, and organized manner, the lawyer must discuss with these witnesses the theory of the case and the witnesses' roles in it, including how the testimony of each relates to the testimony of others.49 For this preparation to be most effective, the lawyer must be candid with the witnesses about the strengths and weaknesses of the case, the areas to emphasize and to avoid, and the vulnerabilities of the opponents.50 Such candor requires that these preparation activities be accorded some degree of privacy.51

will face in the courtroom."); see also Follingstad, Preparing the Witness for Courtroom Testimony, Trial, Jan. 1984, at 50, 50 (describing how to present a more attractive witness by alleviating the witness's anxiety).

46. The Senate recently voted to restore North's pension, which had been suspended following his conviction for crimes arising out of his Iran-Contra activities. Rasky, After Sharp Debate, Senate Votes to Let North Collect His Pension, N.Y. Times, Nov. 3, 1989, at A12, col. 4.

47. The tension between zealousness and "the bounds of the law," apparent on the face of the standard, is the locus of much of the ethical debate on witness preparation. See infra section III(C)(2). Professor Hazard has said that a lawyer "must be mindful that measures not prohibited in aid of a client are approximately obligatory, for failure to use them is a failure of 'zeal.'" If there remains an ethically autonomous course for the conscientious lawyer, it lies between Scylla and Charybdis. G. HAZARD, ETHICS IN THE PRACTICE OF LAW 42 (1978); accord, Luban, The Adversary System Excuse, THE GOOD LAWYER 83, 89 (D. Luban ed. 1984). Luban disagrees profoundly that the lawyer should be obliged to take every step short of the unethical or illegal; "within the bounds of the law," he contends, should not mean "to the limit of the law and then a bit further." Id.

48. See infra notes 110-129 and accompanying text.

49. See R. ARON & J. ROSNER, supra note 2, at 58, 389-90; J. JEANS, LITIGATION §§ 5.15-16 (1986); Parnell, supra note 44.


51. See, e.g., United States v. Jones, 542 F.2d 186, 208-10 (4th Cir.), cert. denied, 426 U.S. 922 (1976) (recognizing that under normal circumstances the defense lawyer is entitled to interview witnesses in private if the witnesses are willing).
The attorney-client privilege provides nearly absolute protection from disclosure for confidential communications between an attorney and a client for the purpose of securing legal advice. The privilege's guarantee of secrecy is intended to promote full and frank disclosure of facts by the client to the lawyer, so that the lawyer can be adequately prepared. It protects only the communication and not the underlying facts, and it does not protect communications used to further crime or fraud.

The attorney-client privilege applies only to communications between the client and the client's attorney. The attorney work-product privilege, judicially established in 1947 in *Hickman v. Taylor*, also protects an attorney's discussions with non-clients. The work-product privi-

52. See Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). See generally E. Cleary, MCCORMICK ON EVIDENCE § 87 (3d ed. 1984) (outlining the background and policy of the attorney-client privilege); 8 J. WIGMORE, EVIDENCE §§ 2290-2292 (1961) (tracing the historical origins and policy rationale for the attorney-client privilege). Logically, the privilege should apply only to factual communications from the client to the lawyer. In practice this distinction is difficult to maintain, because much communication from the lawyer to the client reveals privileged client communications. See E. Cleary, supra, at § 89; see also 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE § 503(b)(1) (discussing generally the history, policy, and statutory definitions of the attorney-client privilege).

53. See Upjohn, 449 U.S. at 389; E. Cleary, supra note 52, § 87, at 205. Whether the privilege encourages frank disclosure by the client and whether such disclosure is an adequate justification for the privilege are hotly debated. See, e.g., Alscher, The Search for Truth Continued, the Privilege Retained, 54 U. Col. L. Rev. 67, 73-75 (1982) (defending the attorney-client privilege against Judge Frankel's critique); Alscher, The Preservation of Client's Confidences, 52 U. Col. L. Rev. 349, 350-53 (1981) (arguing that in addition to improving information flow, the attorney-client privilege promotes a feeling that our legal system is fair); Frankel, The Search for Truth Continued: More Disclosure, Less Privilege, 54 U. Col. L. Rev. 51, 61 (1982) (asserting that even in a profession addicted to myths and fictions, the popular rationale for the attorney-client privilege is "too flimsy to last").

54. See Upjohn, 449 U.S. at 395-96.

55. See United States v. Zolin, 109 S. Ct. 2619, 2626 (1989); see, e.g., Clark v. United States, 289 U.S. 1, 15-16 (1933) (reviewing the history of the attorney-client privilege and concluding that "[i]n the privilege takes flight" if used to commit a fraud); United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir. 1988) (affirming that "[a] conversation will not be cloaked with privilege when it is for the purpose of committing a crime"); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) (concluding that "[i]t is beyond dispute that the attorney-client privilege does not extend to communications regarding an intended crime"); 8 J. WIGMORE, supra note 52, § 2298, at 572 (asserting that "[i]t has been agreed from the beginning that the privilege cannot avail to protect the client in concerting with the attorney a crime or other evil enterprise").

56. In cases of joint defense arrangements, there may be an exception to this principle. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 comment (1989) (noting that the attorney-client privilege generally does not attach between commonly represented clients).

57. 329 U.S. 495 (1947). This Article refers to both the attorney-client and the work-product protections as privileges. It has been traditional not to confer that dignity on the work-product doctrine. See Cohn, The Work-Product Doctrine: Protection, Not Privilege, 71 GEO. L.J. 917, 943 (1983). The Supreme Court, however, recently abandoned its practice of not referring to work product as a privilege and called it a "qualified privilege." United States v. Nobles, 422 U.S. 225, 237-38 (1975). Professor Marcus applauds this change, arguing that the analytical distinction between the two has broken down. See Marcus, The Perils of Privilege: Waiver and the Litigator, 84 MICH. L. REV. 1605, 1624 (1986).
le is based on the structure of the adversary system, and it broadly protects pretrial preparation:

Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client’s case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. Thus “interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible” things are accorded protection from disclosure. The Hickman Court expressly viewed the work-product privilege as a bulwark against unethical trial preparation practices—such as stripping files and placing misleading memoranda in files—by rendering them unnecessary.

As codified by Federal Rule of Civil Procedure 26(b)(3), the work-product privilege protects most trial preparation materials (“ordinary” work product) from disclosure unless an opposing party demonstrates a “substantial need” for it. “Core” work product—“the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation”—is afforded virtually absolute protection.

58. Justice Jackson, concurring in Hickman, explained: “[A] common law trial is and always should be an adversary proceeding. Discovery was hardly intended to enable a learned profession to perform its functions either without wits or on wits borrowed from the adversary.” Hickman, 329 U.S. at 516 (Jackson, J., concurring).
60. See id. at 511.
62. See FED. R. CIV. P. 26(b)(3). Codification is only partial, because by its terms Rule 26(b)(3) only applies to “documents and other tangible things . . . prepared in anticipation of litigation or for trial by or for [a] party or . . . that . . . party’s representative,” id., whereas Hickman applies to intangible work product as well. See Hickman, 329 U.S. at 511. Presumably, Hickman continues to apply to intangible work product such as oral communications from a lawyer to a client that are not otherwise protected by the attorney-client privilege. See Clermont, Surveying Work Product, 68 CORNELL L. REV. 755, 757-58 (1983).
63. FED. R. CIV. P. 26(b)(3).
64. In Upjohn, the Supreme Court declined to hold that core work product could never be disclosed, but it did not suggest any circumstances under which disclosure might be appropriate. See
The attorney-client and work-product privileges perform complementary functions in trial preparation. The attorney-client privilege protects most of the preparation activities directly involving the client; the work-product privilege protects the lawyer's own efforts, including research, investigation, and contacts with other witnesses. *Upjohn Co. v. United States* is illustrative:

The notes and memoranda sought by the Government here, however, are work product based on oral statements. If they reveal communications, they are, in this case, protected by the attorney-client privilege. To the extent that they do not reveal communications, they reveal the attorneys' mental processes in evaluating the communications.

Indeed, it may be debated how different the attorney-client and work-product privileges really are. One commentator believes that the two are merging in the Supreme Court's thinking: "Blending the two privileges also reflects reality, because a great deal of potentially discoverable material falls within both. As a functional matter, then, what the Court may be doing is ensuring a zone of silence for effective and ethical preparation of cases." The synthesis of the two doctrines makes sense in the context of witness preparation. On work-product and attorney-client grounds, courts regularly refuse to compel disclosure of trial preparation activities with witnesses. Courts have also objected to deposition questioning designed "to elicit from the witness the specific questions that counsel posed to him, or even the area of the case to which he directed the majority of his questions."

*Upjohn Co. v. United States*, 449 U.S. 383, 401-02 (1981). The Supreme Court has never permitted discovery of core work product in the absence of waiver, see 3 J. WEINSTEIN & M. BERGER, *supra* note 52, ¶ 612[04], at 612-45, and some circuits have held that the protection is absolute. See Duplan Corp. v. Moulinage et Retordierie de Chavanoz, 509 F.2d 730, 736 (4th Cir. 1974), cert. denied, 420 U.S. 997 (1975); *In re Grand Jury Proceedings*, 473 F.2d 840, 846 (6th Cir. 1973); see also *In re Grand Jury Investigation*, 599 F.2d 1224, 1232-33 (3d Cir. 1979) (noting that the need to impeach a witness's statement would require disclosure of ordinary but not core work product).

66. *Id.* at 401.
67. Marcus, *supra* note 57, at 1624. *But see* Cohn, *supra* note 57 ("[T]he work-product protection is just that: a protection. It has not yet been fully elevated to the status of a privilege.").
69. See *In re Terkel Toub*, 256 F. Supp. 683, 685-86 (S.D.N.Y. 1966); see also Giordani v. Hoffmann, 278 F. Supp. 886, 891-92 (E.D. Pa. 1968) (refusing to find that "information regarding the actions which transpired in preparing for a deposition have any relationship to the merits"); Bercow v. Kidder, Peabody & Co., 39 F.R.D. 357, 358 (S.D.N.Y. 1965) (refusing to require witness to reveal to questioner the people with whom he had met and the documents he had reviewed in preparation for a deposition).
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3. Hostile Witnesses: Disclosure of Strategy and Waiver of Privileges.—Adequate preparation for trial includes not only preparing the client and friendly witnesses, but also interviewing adverse witnesses to learn the strengths and weaknesses of the opponent's case and if possible to neutralize adverse testimony. Such interviews enhance the entire fact-finding process. By speaking with an adverse witness outside a formal deposition setting, a lawyer may be able to suggest that the witness’s memory is inaccurate or that the events were not as clear as the opponent claims. The lawyer may also be able to determine that some material is not based on the witness’s personal knowledge. Even if the witness's testimony remains unchanged, prior discussion will improve the lawyer's effectiveness in cross-examination—the archetypal tool of adversarial truth seeking.

Despite the benefits a lawyer can obtain by interviewing hostile witnesses, the lawyer who conducts such interviews risks waiving the protection afforded to some privileged material. A lawyer’s private notes of conversations with a hostile witness are unquestionably core work product. In defining the work-product privilege, Hickman made no distinction between the types of witnesses interviewed, and such a distinction would not make sense for private notes. However, questions asked and subjects covered may reveal the questioner’s concerns and strategy. Because a lawyer cannot compel a witness to remain silent about matters discussed in preparation, discussions with a hostile witness are virtually certain to be communicated to the adversary. The lawyer must, therefore, balance the value of obtaining information on important points against the danger of revealing strategy. In depositions at least, the usual advice is that the value of the information obtained outweighs the value

plaintiff's counsel posed to him, . . . it exceeds the permissible bounds of discovery” (quoting Ford, 82 F.R.D. at 360)); Ceco Steel Prods. Corp. v. H.K. Porter Co., 31 F.R.D. 142, 144 (N.D. Ill. 1962) (asserting that “the information which defendants here seek should be readily available direct from the witnesses for the asking and not through disclosure of conversations with counsel held for purposes of discovery and trial preparation”).

71. See United States v. Jones, 542 F.2d 186, 208 (4th Cir.), cert. denied, 426 U.S. 922 (1976) (concerning a defense lawyer seeking the opportunity to interview hostile government witnesses privately). Causing witnesses to reconsider their positions before trial and deposition could have salutary effects on judicial efficiency by encouraging opponents to take a more realistic view of the case at an earlier point, which could encourage settlement.

72. Edelstein, 526 F.2d at 41-42. The fourth of the late Irving Younger’s “Ten Commandments of Cross-Examination” was “Never ask a question to which you do not already know the answer.” Younger, Cicero on Cross-Examination, in The Litigation Manual 532, 532-33 (J. Koeltl 2d ed. 1989).

73. See Hickman v. Taylor, 329 U.S. 495, 509-10 (1947) (holding that an attempt to secure witnesses' written and oral statements made to an attorney during the course of legal representation “falls outside the arena of discovery and contravenes the public policy underlying the orderly prosecution and defense of legal claims”).
of absolute secrecy.\textsuperscript{74}

Implied waiver of confidential material poses a more difficult problem for the attorney who interviews a hostile witness.\textsuperscript{75} The attorney-client and work-product privileges can be waived by a disclosure that is inconsistent with the purposes of the privileges. The attorney-client privilege is based on the confidential nature of the attorney-client relationship, therefore \textit{any} disclosure—deliberate or inadvertent—to a third party constitutes a waiver because it is inconsistent with the purpose of the privilege.\textsuperscript{76} The inconsistency test for the attorney-client privilege would appear to be met by virtually any disclosure to an adverse party, with the possible emergent exception of inadvertent disclosures.\textsuperscript{77} Work product, on the other hand, does not depend directly on the attorney-client relationship. Although this qualified privilege provides less absolute protection, it has correspondingly greater flexibility concerning waiver. Because the secrecy of work product is often important only to adversaries, only revelation to an adversary is truly inconsistent with the privilege.\textsuperscript{78} Nevertheless, while communications with a friendly or neutral (non-client) witness may not result in waiver, disclosure to a hostile witness is likely to be construed as an implied waiver of a potentially


\textsuperscript{75} The issue here is \textit{implied} waiver. Deliberate or express waiver is rare and, in any event, wholly within the power of the party waiving the privilege. Implied waiver, by contrast, is involuntary and can be used offensively by an opponent to obtain disclosure of material that the first party wishes to keep secret. Once established, waiver can be extremely broad. Some courts have held that very minimal and indirect disclosures can result in wholesale availability of the material. \textit{See} Nye v. Sage Prods., Inc., 98 F.R.D. 452, 453 (N.D. Ill. 1982); \textit{see also} Marshall v. United States Postal Serv., 88 F.R.D. 348, 350 (D.D.C. 1980) (indicating that answering questions about the accuracy of documents may result in waiver of the attorney-client privilege with respect to the documents in their entirety). Waiver of the attorney-client and work-product privileges is comprehensively discussed in two excellent works. \textit{See} Marcus, \textit{supra} note 57, at 1605-55; \textit{Developments in the Law—Privileged Communications}, 98 \textit{Harv. L. Rev.} 1450, 1629-65 (1985) [hereinafter \textit{Privileged Communications}].

\textsuperscript{76} \textit{See}, \textit{e.g.}, United States v. American Tel. & Tel. Co., 642 F.2d 1285, 1299 (D.C. Cir. 1980) ("Any voluntary disclosure by the holder of [the attorney-client privilege] is inconsistent with the confidential relationship and thus waives the privilege."); United States v. Gordon-Nikkar, 518 F.2d 972, 975 (5th Cir. 1975) ("A communication divulged to 'strangers' or outsiders can scarcely be considered a confidential communication between attorney and client."); \textit{see also Privileged Communications, supra} note 75, at 1659-65 (discussing the possibility of waiver through a variety of inadvertent actions).

\textsuperscript{77} Inadvertent disclosure has usually been held to constitute waiver. It has, however, been suggested that this result is unfair and unjustified. \textit{See}, \textit{e.g.}, Marcus, \textit{supra} note 57, at 1619-48 (arguing that a fairness test should dictate whether a particular privilege has been waived); \textit{Privileged Communications, supra} note 75, at 1659-65 (same).

\textsuperscript{78} \textit{See American Tel.}, 642 F.2d at 1299 ("The purpose of the work product doctrine is to protect information against opposing parties, rather than against all others outside a particular confidential relationship, in order to encourage effective trial preparation."); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222-23 (4th Cir. 1976) (finding that subject-matter waiver is broader for the attorney-client privilege than for the work-product privilege).
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broad range of confidential witness-preparation materials.79

The doctrines of privilege and waiver are in constant tension with each other. The attorney-client and work-product privileges together provide comprehensive protection for witness preparation. Under this rubric, many courts have strictly protected oral preparatory activities. However, there is also considerable judicial hostility toward privileges and a corresponding willingness to find waiver, because privileges thwart discovery of information and its sources.80 As a result, lawyers have been unable to predict with certainty whether preparatory activities will be disclosed.

4. Experts: Accuracy and Advocacy.—Experts comprise a fourth distinct group of witnesses. The function of the expert witness is both the most neutral and the most partisan. Unlike other witnesses, experts must be qualified before they testify, and that qualification requires that the testimony “assist the trier of fact to understand the evidence or to determine a fact in issue.”81 This version of the expert’s role is distinctly non-partisan and is based on the existence of impartial, often scientific, knowledge.82 It is, therefore, particularly ironic that the use of experts has led to some of the most notorious abuses of the adversary system. Often lacking any hint of impartiality, experts have been called “saxophones.”83 Despite any implicit claim that an expert witness speaks impartial truth, “the expert’s view may have originated with an attorney’s opinion or theory.”84

The ambiguous role of experts is particularly problematic because expert witnesses require considerable preparation. They ordinarily lack the personal knowledge required of other witnesses;85 without prepara-

79. See In re Doe, 662 F.2d 1073, 1081 (4th Cir. 1981), cert. denied, 455 U.S. 1000 (1982) (explaining that when an attorney freely and voluntarily discloses the contents of an otherwise protected work product to someone with interests adverse to his client, he may be deemed to have waived the work-product protection).
80. See United States v. Nixon, 418 U.S. 683, 710 (1974) (discussing privileges generally and concluding that “these exceptions to the demand for every man’s evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth”).
81. FED. R. EVID. 702.
82. See, e.g., Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 407 (E.D. Va. 1975) (holding that since a party’s employees are not “impartial observer[s],” they are regular witnesses and not expert witnesses, whose conclusions may be work product); see also R. ARON & J. ROSNER, supra note 2, at 283 (suggesting that the expert should be presented as a “kindly teacher”).
85. See FED. R. EVID. 703 (expert testimony may be based on facts or data “perceived by or made known to the expert at or before the hearing”). The “insider” expert (for example, a product safety manager) who has both personal knowledge and expert views presents a number of problems that are beyond the scope of this Article. See generally Virginia Elec., 68 F.R.D. at 407 (concluding
tion, they could not testify at all. Consequently, the Federal Rules of Evidence contemplate some degree of preparation by the sponsoring party. The necessity for hypothetical questions has been abolished. The basis of the expert's testimony can be "facts or data . . . made known . . . at or before the hearing." Witness preparation usually provides the foundational material for the testimony.

Because the expert's conclusions depend on the groundwork provided by the preparer, the cross-examiner's access to the preparatory material is essential. According to the garbage-in-garbage-out principle, a witness who receives an inaccurate or biased foundation cannot provide valid opinions. Rule 705 sensibly provides that experts "may in any event be required to disclose the underlying facts or data on cross-examination." Nevertheless, the applicable Federal Rules of Civil Procedure are curiously stingy in their provisions for disclosure of the basis for an expert's testimony. Under the partisan model of the role of experts, communications between an expert and a lawyer are confidential trial preparation protected by the work-product privilege. Such discussions clearly reveal strategy and attempted routes of proof. Rule 26(b)(4), which modifies the work-product privilege, provides for discovery of "facts known and opinions held by experts" and "a summary of the grounds for each opinion," but only through interrogatories. The rule does not provide a right to use depositions or document requests to obtain this information. Detailed information concerning the basis of an expert's opinion—presumably what is contemplated by rule 705—may be obtained only upon motion.

86. See Fed. R. Evid. 702; id. advisory committee's notes.
87. Fed. R. Evid. 703 (emphasis added); see also Fed. R. Evid. 705 ("The expert may testify in terms of opinion or inference and give reasons therefor without prior disclosure of the underlying facts or data, unless the court requires otherwise."). For a checklist of written materials to be supplied to an expert, see S. Baldwin, supra note 12, at 427-30.
88. Fed. R. Evid. 705.
89. The work of nontestifying experts as advisors to counsel is specifically protected from discovery except in "exceptional circumstances." Fed. R. Civ. P. 26(b)(4)(B). The same expert can be both advisor and witness, but the rule as presently structured would permit full discovery of such a person.
90. See Fed. R. Civ. P. 26(b)(4)(A)(ii); United States v. International Bus. Machs. Corp., 72 F.R.D. 78, 81-82 (S.D.N.Y. 1976). It may also be obtained, and often is, by agreement of the parties. For an overview of the problems of discovery of materials provided to a testifying expert, see Note,
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Not surprisingly, the courts have liberally construed rule 26(b)(4), seldom denying access to "input" material. For example, in "double expert" cases, in which the evidence of a testifying expert is based on the work of a nontestifying expert, courts have invariably granted access to the underlying work, notwithstanding the express protection that the rules give to the work of nontestifying experts.91 Moreover, the courts have been extremely reluctant to accord work-product protection to communications between a lawyer and an expert. By providing for discovery of expert opinions "developed in anticipation of litigation," rule 26(b)(4) carves out an exception to rule 26(b)(3) for ordinary (nonopinion) work product. Some courts have interpreted rule 26(b)(4) as simply overriding rule 26(b)(3) for experts who will testify.92

Practical guides for litigators emphasize that lawyers must also carefully prepare experts to ensure that their testimony is comprehensible and to minimize any doubts, uncertainties, or unfavorable views.93 The latter purpose of preparation suggests saxophony, but the former is crucial to the expert's usefulness to the trier of fact. Competent preparation of many cases will require consultation with appropriate experts to support a client's point of view. The provisions that shield an attorney's search for an expert witness from discovery reinforce the ethical obligation to present the strongest possible case for the client.94


93. See, e.g., R. ARON & J. ROSNER, supra note 2, at 283-89; Hanley, Working the Witness Puzzle, in THE LITIGATION MANUAL 477, 480-81 (J. Koeltl 2d ed. 1989); see also A. TRANKELL, RELIABILITY OF EVIDENCE 159-60 (1972) (psychologist witness must be sure that his testimony is couched in "clear and understandable language").

B. Preparation Methods

Lawyers use several techniques in varying degrees to prepare the different types of witnesses. A lawyer can prepare a witness to testify by discussing the matter, by reviewing relevant documents, or by rehearsing the anticipated direct examination and cross-examination. Each method may encompass many variations. This section identifies seven basic preparation techniques and discusses the rules implicated by the use of these techniques.

1. General Advice: Molding Personality.—The most common kind of witness preparation is advice on the role of a witness and appropriate courtroom demeanor. Any lawyer who represents a prospective witness has a responsibility to explain to the witness, among other things, where to sit, what to wear, and how to address the judge. The lawyer should also discuss the required oath and the consequences of its violation. In addition, the lawyer should identify those who will question the witness and should instruct the witness to speak clearly, and to verbalize answers instead of nodding. A lawyer might also explain the importance of being candid but concise, controlling one’s temper, challenging hidden assumptions in questions, and looking at the jury. Lists of good advice are legion.95 A lawyer usually delivers this advice orally in a conference with the witness, though many lawyers have written instructions that they give to each prospective witness to save time.96

General advice is useful in ensuring a relaxed witness who will testify clearly and who will not be sidetracked or flustered by a cross-examiner. Such general advice is also relatively innocuous in terms of distorting testimony, because it is nonsubstantive. In some situations, however, calming and relaxing a witness tends to induce an unwarranted degree of certainty in the witness’s testimony. Such preparation may un-

95. See, e.g., R. Aron & J. Rosner, supra note 2, at 184-211 (explaining how to advise witnesses about the general aspects of testifying); M. Dombroff, Key Trial Control Tactics 311-17 (1983) (discussing ways to prepare witnesses for direct examination and to anticipate the opponent’s strategy on cross-examination); J. Kestler, supra note 3, §§ 9.21-.57 (detailing the instructions to be given to witnesses before testifying); J. Sonsteng, R. Haydock & J. Boyd, The Trialbook 213 (1984) [hereinafter J. Sonsteng] (listing instructions that should be given to witnesses); McElhaney, supra note 13, at 80-82 (explaining how to advise the witness about proper appearance, actions, and manner of speech).

96. See, e.g., Boring, 97 F.R.D. at 405 (discussing the use of an “expert witness letter”). Secrecy is not particularly important for demeanor preparation. While general instructions to witnesses are part of a good litigator’s basic stock in trade and as such constitute work product, as a practical matter demeanor advice is often so generic that it will tell an opponent absolutely nothing of strategic utility. Secrecy, therefore, would encourage little to be said in this area that would not be said anyway.
wittingly turn a skeptical witness into a true believer. For example, in response to a lawyer's advice to speak clearly and confidently, a witness might deliberately change an uncertain recognition of a suspect to definite recognition of the suspect. This change is perjury. But when, as is more likely, the changed testimony is not deliberately wrong but rather the result of suggestion, the "true believer" is less obviously, and certainly less provably, a perjurer.

Demeanor preparation is extremely problematic when it is designed to produce a false representation of a witness, because the perjury rules do not govern this type of witness preparation. At the more acceptable end of the spectrum are instructions to a witness to adopt a more decisive manner. In some instances, the "choice of words may . . . improve the clarity and precision of a statement." The opposite end of the spectrum includes a lawyer's advice intended to make a sociopathic triple-murderer seem like a regular guy. Some authors advocate such preparation as the necessary "remolding" or "transforming" of the witness.

Professor Follingstad, a psychologist writing for the plaintiffs' bar, advises how to make witnesses more presentable for trial. The witness and lawyer together identify the personality traits of the witness and work to accentuate the positive and suppress the negative. Through numerous discussions, the lawyer urges the witness to "develop" positive qualities and to adopt "new behaviors." Follingstad concludes:

Roleplaying is one of the most important techniques for producing desired testimony, but it requires great patience and prac-

97. See supra text accompanying notes 271-306.
98. Bellow and Moulton pose a similar hypothetical. See G. BELLOW & B. MOULTON, supra note 13, at 357 (discussing whether a witness should be advised not to mention her own doubts about the identity of the accused).
99. Id.
100. The cynical observer might find an example of nonperjurious image creation in the John DeLorean cocaine trial in 1984. DeLorean, "born again" after his arrest on charges of trafficking in narcotics, carried a Bible with him to court every day. See Metzler, United Press Int'l, Mar. 31, 1984 (LEXIS, NEXIS library, OMNI file). His wife, Christina Ferrare, played the role of the devoted supporter throughout the trial, then left him within a few weeks of his acquittal, having privately announced her intentions to do so during the trial. See Alexander, Another Roadblock for a Dreamer, TIME, Sept. 30, 1985, at 66, 66; DeLorean and Ferrare Begin Trial Separation, N.Y. Times, Sept. 19, 1984, at A18, col. 5. The couple was later divorced. J. DELOREAN, DELOREAN 329-32 (1985).
101. See J. KESTLER, supra note 3, § 9.02 (noting that "even a shrinking violet can be transformed into a gladiator for your cause"); Vogel, Preparation of Witnesses for Trial, 19 INS. COUNS. J. 394, 395 (1952) ("Trial counsel has the job of remolding to some extent the personalities of such witnesses.").
102. See Follingstad, supra note 45, at 54-58.
103. Id. at 52. A "communications consultant" at the Idora Silver & Associates School of Witness Preparation reports: "In too many cases, the attorney watches in horror as the carefully coached witness falls apart during testimony, reverting to defective modes of behavior supposedly corrected by the training program." Thimmesch, supra note 2, at 32.
tice. While time-consuming, the benefits increase each time roleplaying is practiced. The result of good roleplaying is the development of new skills that appear quite natural. Roleplaying means just that—playing or practicing behaviors . . . .

. . . The lawyer [in a roleplaying session] should observe the witness carefully, recording any problematic statements and negative behaviors.104

Follingstad specifically denies that the change is meant to be permanent.105 The witness’s trial personality is not, therefore, in any meaningful sense real.

Lawyers at the opposite table have received similar advice. The civil defense bar has learned to personalize the corporate defendant by choosing a likable and moldable witness as the corporate representative, rather than a person with any useful personal knowledge.106 According to one commentator, “The witness . . . does not know,” and the lawyer must therefore provide, “the specifics of the case, the strategic areas which will be covered, the manner in which the questions will be asked and what the responses should be.”107

Since a witness’s personality is, of course, not technically an issue at trial, the effect of a changed personality, standing alone, on the overall integrity of the judicial system might be minimal. What is troubling, however, is the thin line between adopting a new personality and adopting new facts. Both previously quoted writers implicitly recognize that to modify the personality, a lawyer and witness may have to modify some of the facts that supported the old personality.108 Although a lawyer seems to have a clear duty to present the client as favorably as the facts permit,109 personality molding obscures the important distinction between a more attractive personality and more attractive facts.

2. Providing Legal Background: Prompting Perjury.110—Naturally, one of the matters discussed in witness preparation should be the applicable law. For example, a lawyer in a products liability case should certainly make some effort to explain the various theories of negligence, warranty, and strict liability that may be involved. There may be a duty to explain the law to a client,111 and in any event, it is hard to imagine a

104. Follingstad, supra note 45, at 56 (emphasis added).
105. See id. at 50 (“Long-standing personality change is not the idea here.”).
106. See Parnell, supra note 44, at 53-54.
107. Id. at 55 (emphasis added).
108. See Follingstad, supra note 45, at 56; Parnell, supra note 44, at 54.
110. The phrase is Professor Freedman’s. See M. Freedman, supra note 14, at 59.
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lawyer's refusing to give a client this information.112 Discussion of the legal background of a lawsuit has obvious utility in preparing any witness: "Witness preparation has the effect of shaping the testimony, focusing on the significant, dropping the irrelevant, emphasizing helpful points, and structuring the presentation to minimize the damage caused by adverse information. This is the process envisioned by the adversary system."113

The process of winnowing the relevant from the irrelevant is not only a useful partisan activity; it is also an essential element in the orderly conduct of a trial before a fact finder with no previous knowledge of the case.

It is not improper for an attorney to prepare his witness for trial, to explain the applicable law in any given situation and to go over before trial the attorney's questions and the witness' answers so that the witness will be ready for his appearance in court, will be more at ease because he knows what to expect, and will give his testimony in the most effective manner that he can. Such preparation is the mark of a good trial lawyer, and is to be commended because it promotes a more efficient administration of justice and saves time.114

Relevance, of course, depends on the legal rules applicable to the case. A lawyer's explaining the rules so that a witness can help the lawyer to discover relevant facts is far more effective than a lawyer's casting about alone in the witness's memory for potentially important observations.

There is a less attractive side to discussions of the law with a prospective witness. Such discussions create the strong possibility of shaping testimony to maximize effect or minimize damage. Discussing the law with a client raises the thorny problem that Professor Freedman labeled "Refreshing Recollection or Prompting Perjury."115 Anatomy of a Murder116 provides an extreme example. The lawyer, having been told by his client facts that would support a first-degree murder conviction, advises the client what different or additional facts might support a verdict of not guilty by reason of insanity.117 Slightly more subtle is the technique of describing an exculpatory scenario to the client before the

112. See J. KESTLER, supra note 3, § 9.14; see also G. BELLOW & B. MOULTON, supra note 13, at 234 (advising attorneys to explain the basic principles of negligence to witnesses in personal injury cases); J. SONSTENG, supra note 95, at 22 (commenting that a witness who is a client needs to know everything about the case).

113. J. KESTLER, supra note 3, § 9.14, at 332; see also Op. No. 79, supra note 5 (discussing the ethical limitations on a lawyer's participation in the preparation of a witness).


117. See id. at 44-49.
client has a chance to tell an incriminating story." Acquainting a witness with the appropriate standard of proof, similarly, might encourage the witness to assert a degree of certainty that is not otherwise justified. The opportunity for influence exists with any witness who is disposed to be cooperative.

The line between advising a client and prompting perjury is unclear both in the 1981 Model Code of Professional Responsibility and in the 1989 Model Rules of Professional Conduct. The Disciplinary Rules of the Model Code are clear that a lawyer may not "[k]nowingly use perjured testimony or false evidence," or "[k]nowingly make a false statement of law or fact." The meaning of "knowingly," however, is not entirely clear. The 1981 Code fails to define the term, and the 1989 Rules define it as "actual knowledge of the fact in question," which "may be inferred from circumstances." This definition seems to preclude deliberate avoidance of knowledge. However, the Code does not re-

118. As Professor Hazard points out, this technique should still present a moral dilemma for the attorney. See G. HAZARD, supra note 47, at 130-31; cf. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-3.2(b) (1982) ("It is unprofessional . . . to intimate to the client in any way that the client should not be candid in revealing facts so as to afford the lawyer free rein to take action . . . ").

119. For example, one article advises counsel to tell medical witnesses to "use precise language to meet the prerequisite of legal causation," citing the failure of the plaintiffs' counsel in a toxic torts case to instruct medical experts to use the phrase "to a reasonable medical certainty." Broadus & Simon, Preparing Experts in Toxic Torts Cases, TRIAL, Oct. 1989, at 35, 36-37. This advice is appropriate only in the very unlikely event that the witness is truly certain but would otherwise forget to express that certainty. Such preparation is cause for concern, however, if the lawyer is encouraging an uncertain witness to suppress factual doubts to meet legal standards.

120. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) to (5) (1981); see also id. EC 7-26 ("prohibit[ing] the use of fraudulent, false, or perjured testimony or evidence" and adding that "a lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline"). Model Rule 3.3(a) provides that:

[a] lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; (3) 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 (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1989).


123. The ABA Standards Relating to the Administration of Criminal Justice provide slightly more guidance in this area of legal uncertainty. A defense lawyer "should probe for all legally relevant information without seeking to influence the direction of the client's responses," and should not try "to instruct the client or to intimate to the client in any way that the client should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts." ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-3.2(a) to (b) (1982); see also Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 843 (1977) (arguing that "informing the client about the kind of testimony that would be
quire the lawyer to seek out reasons to disbelieve a client: "In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client." Similarly, a lawyer is ordinarily entitled to rely on the client for information on which to base legal opinions or pleadings. The ABA clearly does not require lawyers to "protect" their clients from committing perjury by withholding legal information, but it also does not endorse Professor Freedman's view that lawyers must always provide legal information. Freedman has argued that litigants inevitably reconstruct an event with a certain amount of bias; therefore, the lawyer should be sure that the bias reflects the client's true self-interest under the applicable legal rules. Ultimately, both the ABA and Freedman attempt to draw a distinction between assistance in developing the facts and creation of facts, but the distinction remains unclear, per-

required in order to produce evidence for a favorable argument in litigation, when it is known that the client will employ the legal advice to commit perjury" is an example of knowing participation in perjury).

124. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-6 (1981). Apparently the opposite of President Reagan's "trust but verify" dictum applies: a lawyer may trust and not verify. See Milliner v. Elmer Fox & Co., 529 P.2d 806, 808 (Utah 1974) (stating that "[a] general rule an attorney is not required to investigate the truth or falsity of facts and information furnished by his client, and his failure to do so would not be negligence on his part unless facts and circumstances of the particular legal problem could indicate otherwise"); cf. Strickland v. Washington, 466 U.S. 668, 691 (1984) (noting that defense counsel may reasonably make strategic choices based solely on information supplied by the defendant without further investigation).

125. See ABA Comm. on Ethics and Professional Responsibility, Formal Op. 335, at 3 (1974) (noting that when an attorney drafts an opinion concerning a securities offering, the duty to verify does not include a detailed investigation unless the facts provided by the client are materially incomplete, suspect, inherently inconsistent, or otherwise open to question); see also Kamen v. American Tel. & Tel. Co., 791 F.2d 1006, 1012 (2d Cir. 1986) (holding that Federal Rule of Civil Procedure 11's duty to make a reasonable inquiry was satisfied by reliance on the client when information was largely in the control of the opposing party); FED. R. CIV. P. 11 advisory committee's note (noting that the issue of "what constitutes a reasonable inquiry may depend on such factors as... whether [the lawyer] had to rely on a client for information as to the facts underlying the pleading").

126. See M. FREEDMAN, supra note 14, at 71 ("There is no conceivable ethical requirement that the lawyer trap the client into a hasty and ill-considered answer before telling him the significance of the question."); Noonan, The Purposes of Advocacy and the Limits of Confidentiality, 64 MICH. L. REV. 1485, 1488 (1966) (arguing that "[a] lawyer should not be paternalistic toward his client, and cannot assume that his client will perjure himself").

127. See M. FREEDMAN, supra note 14, at 68-75. An example of explaining the applicable law to encourage truthful testimony is described in Nix v. Whiteside, 475 U.S. 157 (1986). Defense counsel told the defendant that he did not need to perjure himself by claiming to have seen a gun in the victim's hand, because the claim of self-defense does not require the actual presence of a gun. See id. at 179-80; cf. Kaplow & Shavell, Legal Advice About Information To Present in Litigation: Its Effects and Social Desirability, 102 HARV. L. REV. 565, 578-80 (1989) (analyzing effects of legal advice when a client without advice may make incorrect assumptions concerning what information is legally favorable).

128. See M. FREEDMAN, supra note 14, at 71-75. Freedman had taken a more permissive view of the lawyer's range of ethical action in his original article on the subject. See Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 MICH. L. REV. 1469, 1478-80 (1966). The ABA observes:

Often a lawyer is asked to assist his client in developing evidence relevant to the state of
haps inevitably so. Given the pressures on lawyers to represent their clients successfully, doubts are at least as likely to be resolved in favor of zealousness as strict truthfulness.

3. Factual Context: Competence and Hearsay.—In preparing a witness, a lawyer usually discusses with the witness the factual context into which the witness’s observations or opinions fit. Lawyers frequently inform witnesses of facts of which they were previously unaware by telling the witnesses directly or by comparing the testimony of witnesses possessing similar knowledge. There are compelling reasons for informing a witness of other views, and most commentators do not question the practice.

Explaining to witnesses the context into which their testimony fits is integral to the presentation of a coordinated case. Individual witnesses are likely to testify more intelligently with an understanding of the factual and legal significance of their observations. This technique increases witnesses’ awareness of issues that might otherwise seem unimportant. In addition, witnesses may, upon reflection, decide that they are not really sure of the facts or that other witnesses are correct. Without an understanding of the underlying facts, witnesses may be flustered at trial by statements of other persons or by documents of which they were unaware. Permitting such surprises would be irresponsible.

mind of the client at a particular time. He may properly assist his client in the development and preservation of evidence of existing motive, intent, or desire; obviously, he may not do anything furthering the creation or preservation of false evidence.


130. See McElhaney, supra note 13, at 82 (advising attorneys in preparing a witness for direct examination to discuss the probable testimony of other witnesses); Summit, supra note 13, at 502 (“He should see, however, what other witnesses have said about areas of overlapping knowledge. . . . Areas where he and other witnesses disagree should be discussed at length.”).

131. See Summit, supra note 13.

132. For example, suppose an eyewitness to an automobile accident tells the lawyer that the defendant’s car was moving at about 45 miles per hour. The witness does not say (and probably does not consciously think) that he is unsure of the speed. Instead, he estimates, based on the unstated assumption that the speed limit is 45 miles per hour in that rural spot. The lawyer, however, knows from observing the scene that the speed limit is 30 miles per hour and that the police investigation of the skid marks showed a speed of 30 miles per hour. There is simply no conceivable reason that it would be preferable, from a partisan or neutral point of view, for a lawyer to permit a witness to testify with apparent certainty only to discover later that the witness was not really certain about the car’s speed.

133. See Summit, supra note 13, at 502 (“While somewhat different recollections may not undercut an entire case, the witness should not be in the position of disagreeing with others without knowing it. . . . whether the witnesses with whom he may disagree are friendly or unfriendly.”).
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when they are avoidable. It is also a disservice to the client, to the witness, and to the court to suggest dishonesty, create confusion, or risk defeat by presenting testimony containing unimportant or illusory testimonial contradictions. Finally, when the witness is a client, loyalty demands full disclosure of the status of the case. It is hard to imagine that a lawyer would refuse to answer a client who asks what another witness will say.

One particular form of comparing testimony—providing witnesses with an opportunity to review their prior statements, including deposition transcripts—emphasizes the value of this technique. Reviewing prior statements is an advisable preparatory activity and a witness's right under the Federal Rules of Civil Procedure. Aside from the obvious sense of fairness that witnesses should not unwittingly be hanged by their own prior statements, the rule makes sense because memory fades. All witnesses should have the opportunity to consult materials that bear directly on their trial testimony.

The idea that witnesses should be protected from unknowingly contradicting themselves can be readily generalized to allow protection against contradicting others. There is no good reason to allow a trial to get bogged down in apparent contradictions that, if considered carefully, are illusory or irrelevant. This approach may smack of explaining away differences, but differences in perspectives between witnesses or between statements of the same witness are to be expected. Presenting a case containing reconcilable conflicts makes the case seem less credible than it should and wastes the court's time.

Group preparation, however, is a highly questionable method of informing witnesses of the context into which their testimony fits. Some practitioners recommend it:

Bring together at the same time your client and all his witnesses, either at your office or at the home of the client. Explain to them what each is expected to do at trial, go over the testimony with them collectively, and outline the salient points you hope to establish.

134. See Bodner, Favretto & Nitschke, Panel Discussion on Preparation of Witnesses, 47 ANTITRUST L.J. 169, 179-80 (1978); Parnell, supra note 44, at 55; see also R. ARON & J. ROSNER, supra note 2, at 313 (reporting the results of an attorney survey showing that avoiding surprises is viewed as one of the most important purposes of the witness preparation process).
136. See Fed. R. Civ. P. 26(b)(3) (allowing a party to obtain a statement previously made about the action or its subject matter without the showing otherwise necessary to overcome the work-product rule).
137. The fifth amendment privilege against self-incrimination is another expression of this sense of fairness. See U.S. CONST. amend. V.
Use of the group method makes for a united front, a dovetailing of testimony, and a uniformity of narration. Each witness sees the case as a whole and the role that he is to play in it. It brings out errors in perception, faulty observations, and improper judgments. It sharpens and refreshes recollections, and thus eliminates the danger of one witness needlessly contradicting another. 138 Obviously, the opportunity for concocting a story in this situation is enormous, and other practitioners caution against using this technique. 139 Not surprisingly, courts have shown great hostility to this type of preparation and have frequently required disclosure of the existence and substance of such meetings. 140

138. E. Low, How to Prepare and Try a Negligence Case 70-71 (1957); see also R. Aron & J. Rosner, supra note 2, at 263 (encouraging a collective final rehearsal with all witnesses); J. Sonsteng, supra note 95, at 22 (noting that lawyers may prepare witnesses individually or in groups).

The following excerpt from the transcript of a coaching session involving a lawyer and three principal government witnesses provides some insight into the mechanics of this approach. The lawyer, who did not represent the government or any other party in the litigation, worked with the witnesses because she wanted the prosecution to be successful. The transcript is fully discussed in United States v. Ebens, 800 F.2d 1422, 1442-45 (6th Cir. 1986). Speaking to the witnesses, the lawyer said:

"The purpose of this meeting tonight is so we can help each other remember exactly what happened, how it happened, when it happened and all the minor details. . . . I was talking with [a fourth witness, not present at the meeting] . . . but according to his version of the facts, it's quite different from what I have so far understood them to be. So, I would center on my facts on what you, three of you, say they are and somehow try to either fit all the other facts around these, or if they don't fit, then I have to watch out, you know, there's something else, somebody saying something else."

Id. at 1431 n.2 (quoting Lisa Chan). Ebens is considered further in subpart IV(C).

139. See, e.g., R. Aron & J. Rosner, supra note 2, at 89 (advising on pragmatic grounds that only two people, the lawyer and the witness, should participate in initial witness interview); Vogel, supra note 101, at 398 (arguing that interviewing witnesses in a group is "usually unwise").

140. See United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir. 1988) (concluding that communications were not privileged when the lawyer tried separately to encourage several witnesses to present "a uniform, knowingly untruthful story"); Ebens, 800 F.2d at 1431 & n.2 (holding that the trial court's exclusion of a tape that recorded a third party's coaching of three prosecution witnesses to resolve conflicts in their testimony was reversible error); United States v. Gordon-Nikkar, 518 F.2d 972, 974-75 (5th Cir. 1975) (holding that conversations between codefendants and their attorneys were admissible, even if protected by the attorney-client privilege, because "[t]he conversations in question dealt with plans to commit perjury").

Once trial begins, the court can order sequestration of the witnesses to avoid group preparation. See Fed. R. Evid. 615 (providing for the exclusion of certain witnesses). "The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion." Fed. R. Evid. 615 advisory committee's note.

An interesting example of the extent to which witness preparation is governed by informal understandings instead of clear rules involved a case in which the court had ordered the witnesses to leave the courtroom and to refrain from discussing their testimony until the jury returned its verdict. Nevertheless, during a weekend recess, defense counsel met with three defense witnesses and discussed the testimony of a key prosecution witness. The Ohio Committee on Legal Ethics and Professional Conduct declined to render an opinion on the ethical propriety of the defense lawyer's conduct concluding, inter alia, that it was a question of law whether the court's order had been violated. Ohio State Bar Ass'n, Informal Op. 81-2 (1981) (excerpted in ABA/BNA, Lawyers' Manual on Professional Conduct 801:6825 (1984)). It is remarkable that it would even occur
Informing witnesses of the factual context of their testimony can also run afoul of the fundamental principle of evidence that the witness and not the lawyer testifies. Witnesses can testify competently only to matters within their personal knowledge. Under this rubric, courts have excluded testimony by persons so subject to suggestion that their testimony was not fairly their own. Witnesses prepared by hypnosis and children are familiar examples. Witness preparation can also suggest information that a witness then adopts as “personal knowledge.” Providing information in this manner—educating the witness—can alter testimony by demonstrating contradictions or unduly increase witness certainty by supplying corroboration. Similarly, courts prohibit hearsay because the witness lacks personal knowledge of the truth of matters asserted by an out-of-court declarant. Information obtained solely from counsel during preparation—information not within the witness’s personal knowledge—is also hearsay.

The competence and hearsay rules serve as minimum protections against attempts to educate witnesses. However, both rules require objections raised at trial, and the ability to raise them successfully requires to the attorney to advise the witnesses in view of the sequestration order. Assuming the lawyer’s good faith, one can only conclude that this form of preparation was so routine to the defense lawyer that he did not believe that a sequestration order prohibited it.

The Supreme Court has recognized that, notwithstanding the likelihood of preparation activities occurring, a sequestration order of this duration could not preclude conversations between a criminal defendant and counsel. See Geders v. United States, 425 U.S. 80, 87-88 (1976) (holding that preventing the defendant from consulting counsel during a seventeen-hour overnight recess during trial deprived defendant of the right to effective assistance of counsel under the sixth amendment). But see Perry v. Leeke, 109 S. Ct. 594, 600 (1989) (declining to apply Geders to a brief recess between direct examination and cross-examination).

141. See Fed. R. Evid. 602.

142. See State ex rel. Collins v. Superior Court, 132 Ariz. 180, 183-84, 644 P.2d 1266, 1269-71 (1982) (en banc) (holding that post-hypnotic testimony is inadmissible because hypnosis is too suggestive and cross-examination is difficult). A dissenter suggested, however, that if testimony is to be excluded on these grounds, then courts would not allow lawyers to talk to witnesses before trial. See id. at 191, 644 P.2d at 1277. See generally Beaver, Memory Restored or Confabulated by Hypnosis—Is It Competent?, 6 U. Puget Sound L. Rev. 155, 155-204 (1983) (arguing that previously hypnotized witnesses are incompetent to testify concerning matters discussed under hypnosis).

143. See generally Christiansen, The Testimony of Child Witnesses: Fact, Fantasy, and the Influence of Pretrial Interviews, 62 Wash. L. Rev. 705, 707-21 (1987) (noting that “a young child is, in certain respects, more vulnerable to suggestion than an adult and more liable to confuse memory of fact with memory of fantasy” and arguing that judges should review the effects of child-witness interviewing and preparation procedures in evaluating the reliability of the evidence). However, some have argued that the suggestibility of children is overstated relative to the suggestibility of adults. See Ingulli, Trial by Jury: Reflections on Witness Credibility, Expert Testimony, and Recantation, 20 Val. U. L. Rev. 145, 164-65 (1986) (maintaining that “[r]ecent studies show that children’s memories are quite good, and that children may not be any more ‘suggestible’ than adults, at least under certain circumstances” (footnote omitted)).

144. See Fed. R. Evid. 802; see also Fed. R. Evid. 801(c) (defining hearsay as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted”).

that the objector know that the witness has been educated. Witness edu-
cation may not be obvious to an opposing attorney, and subtly prepared
witnesses may not realize that their observations have been expanded
during discussions with counsel.

4. Factual Details: Cross-Examination.—The most basic function
of witness preparation is to elicit in detail what the witness knows. Elic-
iting detailed information is necessary if lawyers are to satisfy their ethi-
cal obligations to be fully familiar with the case and to present the case
persuasively. Unlike providing factual context, eliciting factual details
results in testimony that is likely to be the witness’s own. The policy
problem is not whether the preparation has added to the witness’s knowl-
edge, but whether suggestive questions have distorted existing percep-
tions. The legal issue is not whether the lawyer should interrogate the
witness during preparation, but the manner in which the interrogation
should be conducted.

The most troubling questioning technique is leading the witness to
particular recollections—“The light was green, wasn’t it?”—or to partic-
ular interpretations—“The letter was a firm offer, wasn’t it?” One
writer, for example, suggests that it is improper to tell a witness what to
say, but nevertheless recommends astonishingly leading questions—
“‘Was Jones going north; or wasn’t it true that he was traveling
south?’” Other commentators describe “subtle and indirect” tech-
niques “that investigators employ to influence witnesses.” A study of
adversarial behavior in law students identified about twenty-five different
coercive, deceptive, or manipulative interrogation techniques. These
techniques are often, unfortunately, effective. Psychologists have demon-
strated that leading questions not only give the witness conscious clues to
shaping the testimony, but can also influence the testimony in such a way
that the witness has no sense of lacking candor.

There is no simple method for combatting suggestive questioning
during witness preparation. Courts must rely principally on cross-exami-
nation and impeachment as the instruments of truth in the adversary
system. In theory, no matter how biased the witness, incomplete the tes-
\[146. See supra section II(B)(1).
\[147. Vogel, supra note 101, at 397.
(1985). But see Rieger, Dombroff on Unfair Tactics (Book Review), 69 Minn. L. Rev. 1430, 1439
(1985) (criticizing legal “gamesmanship” as sometimes leading to bad advice and ethical problems).
\[149. See Stark, supra note 4, at 411-13.
\[150. See infra subpart III(A).]
veal motives, fill in gaps, and expose falsehoods.\textsuperscript{151} The Supreme Court has recently reaffirmed its faith in cross-examination: "Skillful cross-examination could develop a record which the prosecutor in closing argument might well exploit by raising questions as to the defendant's credibility, if it developed that defense counsel had in fact coached the witness as to how to respond on the remaining direct examination and on cross-examination."\textsuperscript{152}

Whether cross-examination deserves the praise heaped upon it or the faith placed in it is an open question. For every tale of a brilliant, slashing "but for which the case would have surely been lost" cross-examination, there are hundreds of cross-examinations that are barely serviceable. Judge Frank has said that a "cool, steady liar who happens not to be open to contradiction will baffle the most skillful cross-examiner in the absence of accidents, which are not so common in practice as persons who take their notions on the subject from anecdotes or fiction would suppose."\textsuperscript{153}

Even assuming that a massive program of continuing legal education could improve the lack-luster cross-examination skills of most lawyers, objectively false but subjectively true testimony would still be a problem. This problem involves a witness whose accurate memory of an event has been altered unintentionally during the course of witness preparation by the witness or, possibly, by the lawyer. In the absence of demonstrably more reliable evidence to the contrary, opposing lawyers will remain unable to discredit such testimony because the witness sincerely believes the testimony is true.\textsuperscript{154} In the absence of directly contradictory evidence, cross-examination is effective, it is said, because the witness's

\textsuperscript{151} See, e.g., Perry v. Leeke, 109 S. Ct. 594, 601 n.7 (1989) (quoting United States v. DiLapi, 651 F.2d 140, 149-51 (2d Cir. 1981) and emphasizing the importance of cross-examination as a "tool for ferreting out truth"); United States v. Nobles, 422 U.S. 225, 230-32 (1975) (noting the effectiveness of compulsory process as an aid to a complete development of all facts); L. STRYKER, THE ART OF ADVOCACY 85 (1954) (asserting that "there is no better laboratory for the dissection of human character and motives" than a trial); 5 J. Wigmore, EVIDENCE § 1367, at 32 (J. Chadbourn rev. ed. 1974) (concluding that cross-examination is "the greatest legal engine ever invented for the discovery of truth"); Gardner, The Memory of Witnesses, 18 CORNELL L.Q. 391, 402-03 (1933) (noting that "[c]ross-examination offers an often-ignored opportunity to discover the effect of suggestion").

\textsuperscript{152} Geders v. United States, 425 U.S. 80, 89-90 (1976); see also United States v. Ebens, 800 F.2d 1422, 1430-31 (6th Cir. 1986) (holding that a defendant is entitled to use a transcript of coaching discussions in cross-examination).

\textsuperscript{153} Frank, "Short of Sickness and Death": A Study of Moral Responsibility in Legal Criticism, 26 N.Y.U. L. REV. 545, 559 (1951); see Penasquitos Village, Inc. v. NLRB, 565 F.2d 1074, 1084-85 (9th Cir. 1977) (Duniway, J., concurring and dissenting). The classic example of the "cross-examiner-as-superman" genre is Irving Younger's lecture on cross-examination. See Younger, supra note 72, at 534.

\textsuperscript{154} See Damaska, Presentation of Evidence and Factfinding Precision, 123 U. PA. L. REV. 1083, 1094 (1975); see also J. FRANK, COURTS ON TRIAL 86 (1950) (remarking that by "[t]elling and retelling it to the lawyer, [the witness] will honestly believe that his story . . . is true").
demeanor will expose any falsehoods during hostile interrogation. Unfortunately, however, evaluating the truthful or untruthful demeanor of a witness may be extremely difficult. Judge Duniway has observed:

I am convinced, both from experience as a trial lawyer and from experience as an appellate judge, that much that is thought and said about the trier of fact as a lie detector is myth or folklore. . . . It is not unusual for an accomplished liar to fool a jury (or even, heaven forbid, a trial judge) into believing him because his demeanor is so convincing.

Conversely, many trial lawyers, and some trial judges, will admit that the demeanor of a perfectly honest but unsophisticated or timid witness may be—or can be made by an astute cross-examiner to be—such that he will be thought by the jury or the judge to be a liar. 155

Judge Weinstein adds that demeanor is even less probative when a lawyer has prepared the witness for testimony. 156 Recognizing this fact, practical guides to witness preparation usually contain a whole host of suggestions for improving demeanor to avoid the appearance of untruthfulness. 157

Cross-examination also has some discouraging side effects. Impeaching a witness in cross-examination typically involves drawing attention to inconsistencies in progressive tellings of the same story or to details that were omitted from earlier statements but were later recalled. As explained previously, careful preparation can avoid insignificant or illusory inconsistencies. By expecting entirely unrealistic completeness and consistency in a witness's perception, memory, and recitation, the legal system values the well-rehearsed witness, though not one with "the rehearsed look," 158 more highly than the less polished but more spontaneous witness. Obviously, inconsistency can denote uncertainty or

155. Penasquitos Village, 565 F.2d at 1084-85 (Duniway, J., concurring and dissenting). Despairing of cross-examination as an accurate means for eliciting the truth, Judge Frank relied on the indefinable sense of a witness's credibility that a judge and jury receive from the witness's behavior and demeanor. See J. Frank, supra note 154, at 20-21; see also L. Stryker, supra note 151, at 87, 99 (describing the effects of the demeanor and appearance of witnesses); Frank, supra note 153, at 559-61 (noting that commentators agree that it is impossible to formulate systematic rules to aid trial judges in assessing a witness's credibility).

156. See Weinstein, Probative Force of Hearsay, 46 Iowa L. Rev. 331, 334 n.20 (1961); see also supra section II(B)(1) (discussing "the thin line between adopting a new personality and adopting new facts").

157. See, e.g., M. Jox, Lawyer's Concise Guide to Trial Procedure 10-12 (1965) (discussing the attorney's final interview with clients and witnesses, in which he informs them of the procedures followed when testifying in court); R. Keeton, Trial Tactics and Methods 25-36 (6th printing 1954) (analyzing the various approaches one could take when preparing witnesses, including dress and nervousness); McElhaney, supra note 13, at 80-82 (discussing witness preparation in areas of dress, demeanor, and speech).

158. J. Sonsteng, supra note 95, at 214 (emphasis added).
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fabrication. Perfect consistency, however, is also a sign of perjury.\textsuperscript{159} Consequently, a good cross-examiner can depict a witness's consistency \textit{or} inconsistency as evidence of unreliability. Therefore, to the extent that cross-examination is effective in raising doubts about a witness's credibility, it is equally effective in discrediting both honest and dishonest witnesses.\textsuperscript{160}

The debate over the effectiveness of cross-examination as a remedy for improper witness preparation is exemplified in the Supreme Court's recent treatment of a criminal defendant's right to consult with counsel during trial. The majority permitted limitations on such conferences during the defendant's testimony, endorsing the view that truth seeking is best served by \textit{not} giving a witness the "opportunity to regroup and regain a poise and sense of strategy that the unaided witness would not possess."\textsuperscript{161} The dissent took issue—quite rightly, in view of the foregoing discussion—with the notion that "the punch-drunk witness . . . contributes to the search for the truth."\textsuperscript{162} Like Judge Duniway, Professor Langbein concludes that the efficacy of cross-examination is "nothing more than an article of faith."\textsuperscript{163} This assessment is accurate. While the adversary system touts the effectiveness of cross-examination for revealing the truth, there is little empirical support for this conclusion. As a result, witness preparation that consists of reviewing factual details presents a particularly troublesome dilemma. More than discussing factual or legal context, this type of preparation is a core pretrial activity, yet it can have subtle and highly deleterious effects on the accuracy of testimony.

5. \textit{Privileged Documents: Fairness and Waiver}.—For several reasons a lawyer may want to use work-product documents to prepare a witness. Setting out in a letter or memorandum the important points of a case, its problem areas, and the approach to proof can be a fast, conve-

\begin{itemize}
  \item \textsuperscript{160} See Frankel, \textit{supra} note 129, at 1039. A cross-examiner who knows that a witness is telling the truth, however, is not ethically permitted to impeach the witness. See \textit{ABA Standards Relating to the Administration of Criminal Justice} Standard 3-5.7(b) (1982) (prosecution function); \textit{id.} Standard 4-7.6(b) (defense function); Saltzburg, \textit{supra} note 11, at 675-76.
  \item \textsuperscript{161} Perry \textit{v.} Leeke, 109 S. Ct. 594, 601 (1989).
  \item \textsuperscript{162} \textit{Id.} at 606 (Marshall, J. dissenting).
  \item \textsuperscript{163} Langbein, \textit{supra} note 83, at 833 n.31.
\end{itemize}
nient, and inexpensive way to prepare a witness.164 Similarly, it is often efficient and effective to use a deposition digest or edited transcript to inform a witness of the testimony of others.165 One practitioner recommends providing a witness with a written summary, based on discussions with the witness, of the expected testimony.166 Other work-product material might include compilations of data or chronologies of important events. The attorney-client privilege can be implicated if the lawyer reviews with the client-witness written communications that relate to the subject matter of the testimony.167

The law is reasonably clear that mere review of privileged material by someone who later becomes a witness does not waive either privilege.168 Direct use of the privileged material, however, or placing that material into issue, does constitute a waiver.169 In United States v. Nobles,170 the defendant sought to call to the stand a defense investigator to impeach the testimony of two eyewitnesses. The investigator would have testified, based on the notes of his conversation with the prosecution witnesses, that both were very uncertain of their observations when they originally spoke with the investigator.171 The Supreme Court, reasoning that the proposed "testimonial use" of the investigator's interview notes would have waived any privilege attaching to them, upheld the district court's refusal to permit the investigator to testify without disclosing the

164. See Marcus, supra note 57, at 1613-14.
166. See Summit, supra note 13, at 503. Since the summary is based on thorough interrogation of the witness, the summarized testimony is not a created story but an aid to witness preparation. This technique, however, may create in the witness unjustified certainty based on the written responses. See infra text accompanying notes 134-152.
168. See id. at 120 n.2 (remarking that there is a greater danger of inaccurate testimony if the witness does not review correspondence before testifying).
169. See id. § 93, at 224 n.5 (noting that it is generally agreed that a party-client's taking the stand as a witness does not constitute a waiver of the lawyer-client privilege for secrecy of communications).
171. See id. at 227-29. This attempted use of the investigator's testimony would have provided an excellent remedy for reducing the effectiveness of the prosecution's witnesses. The defense attempted to establish that the witnesses' subsequent conversations with the prosecutor increased certainty and perhaps distorted recollection.
Witness Preparation

notes.\textsuperscript{172} Witness preparation seems to fall between mere review and testimonial use. It is more influential than review, but it is not testimonial because the witness does not testify \textit{about} the work product. Thus, the courts usually require disclosure of work-product materials given to experts, using a range of legal theories.\textsuperscript{173} However, several courts have refused to require witnesses—both clients and third-party witnesses—to reveal what documents they reviewed or what discussions took place between them and counsel in preparation for testimony.\textsuperscript{174}

The use of privileged documents to prepare a witness raises several fairness problems. A lawyer can educate the witness with documents that the opponent is unaware of or unable to use for cross-examination.\textsuperscript{175} An attorney can influence testimony by creating recollection or instilling unjustified certainty.\textsuperscript{176} Lawyers can also use partial disclosure—make "strategic" use—of privileged documents to limit or distort the opponent's understanding of the case.\textsuperscript{177} In each instance, the opponent has no access to the materials that constitute some of the basis for the witness's testimony. The difficulties are not unique to privileged documents; in a sense, the whole witness-preparation process involves influences on testimony. Documents, however, can be uniquely influential on a witness's testimony.\textsuperscript{178}

Professor Marcus has proposed a fairness test for disclosure of privileged documents used in witness preparation.\textsuperscript{179} He recommends that courts appropriate the test used for discovery of material covered by Federal Rule of Criminal Procedure 6(e), which prohibits disclosure of "matters occurring before the grand jury."\textsuperscript{180} Grand jury secrecy is jealously guarded. To obtain disclosure, the person seeking grand jury materials

\textsuperscript{172} \textit{Id.} at 239. This case involved the work product of the investigator, who was the defendant's agent. The notes, thoughts, or mental impressions of a lawyer were not at issue. \textit{See id.} at 238-39.

\textsuperscript{173} \textit{See}, e.g., Boring v. Keller, 97 F.R.D. 404, 407-08 (D. Colo. 1983) (holding work product discoverable under rule 26(b)(4) but not under rule 612); United States v. Internation Business Machs. Corp., 72 F.R.D. 78, 82 (D.C.N.Y. 1976) (requiring a plaintiff to produce documents that were considered by its expert witnesses "in arriving at opinions and conclusions to which they will testify during trial except to the extent that such documents contain information generated by the expert").

\textsuperscript{174} \textit{See supra} notes 49-70 and accompanying text.

\textsuperscript{175} This problem is Professor Marcus’s principal concern. \textit{See Marcus, supra} note 57, at 1647.

\textsuperscript{176} \textit{See id.} at 1644.

\textsuperscript{177} \textit{See Privileged Communications, supra} note 75, at 1632-35; \textit{see also} Marshall v. United States Postal Serv., 88 F.R.D. 348, 350-51 (D.D.C. 1980) (discussing the full disclosure rule, which prevents litigants from disclosing only self-serving portions of privileged communications).

\textsuperscript{178} \textit{See text accompanying} notes 183-185.

\textsuperscript{179} \textit{See Marcus, supra} note 57, at 1647-48.

\textsuperscript{180} \textit{FED. R. CRIM. P. 6(e)(2).}
must make a strong showing of "particularized need."181 Under Marcus's proposal, the appropriate inquiry would ask whether the use of the privileged document limited unfairly the ability of the opposing lawyer to cross-examine or whether the use was an abusive method for immunizing preparation from scrutiny.182 Application of this standard to witness preparation involving otherwise privileged documents seems an eminently sensible suggestion. Moreover, it takes law that pulls in two directions—privilege and waiver—explicitly recognizes the conflict and directly balances the competing concerns under the single, fundamental criterion of fairness.

6. **Discoverable Documents: Recollection Refreshed.**—Practitioners universally recommend that before taking the stand, witnesses review any non-privileged documents that are important to the case.183 Documents are usually very important in cases of any complexity. Careful review of important documents is crucial for the development of the facts by all parties and by the tribunal. Procedurally, because each document can be lengthy, review while a witness testifies is impractical. Moreover, documents often contain subtleties that a brief reading or review will miss. An unprepared witness is left open to inaccurate suggestion from a cross-examiner.

Pretrial document review is also substantively important. Documents are often meaningful only in the context of other documents and other testimony. The history of a letter or subsequent correspondence can explain an ambiguous reference, alter its meaning, or indicate that a proposal was later discarded. In context, an apparently important and damaging letter may turn out to be insignificant or even helpful. Written material can also simply be wrong. It is as subject to error as oral testimony, but because fact finders give great credence to written materials, the testifying witness must be in a position to explain any such errors or be prepared to support a different story.184 The Third Circuit has noted that unless a witness has reviewed documents prior to a deposition, "neither plaintiff nor defendant [will] realize the full benefit of a well-prepared deponent's testimony."185

182. See Marcus, supra note 57, at 1654-55.
185. Sporck v. Peil, 759 F.2d 312, 317 (3d Cir.), cert. denied, 474 U.S. 903 (1985). The court's logic in this sentence is circular, but the point—that preparation has significant benefits—is well taken.
Witness Preparation

Many lawyers, after initial consultation with all potential witnesses and other preparatory activities, collect and organize the important documents for further review with each witness. Although the lawyer can use mechanical selection criteria, such as all documents that contain the witness's name, it is usually more effective for the lawyer to choose documents based on an analysis of the entire case. The selection of documents for review by a witness, therefore, involves some of the most important and detailed judgments that lawyers make in preparing for trial. "In cases that involve reams of documents and extensive documentary discovery, the selection and compilation of documents is often more important than legal research." By gathering together, selecting, and organizing documents for witnesses to review, the lawyer makes choices between the relevant and irrelevant, the important and unimportant, the sensitive and innocuous. The documents selected for review also reflect the lawyer's efforts to gather other information about the case, including facts obtained from the client. Ultimately, they reveal the lawyer's assessment of the strengths and weaknesses of the case and the strategy for handling both.

The collection of these documents implicates the core work-product privilege for lawyers' mental impressions and thought processes, even though each individual document is discoverable. Disclosure of such collections would result in all the evils that Hickman sought to avoid: it would discourage thorough preparation because lawyers would fear disclosure of strategies, and it would encourage the use of "sharp practices" intended to mislead an opponent. Protection of this work product prevents one party from capitalizing on another's intelligence and avoids the possibility of the lawyer's becoming a witness if preparation becomes a substantive issue in the case. Courts have uniformly recognized that the

186. See J. Kestler, supra note 3, § 9.19, at 336; Parnell, supra note 44, at 55.
188. Id.
189. See id.
190. For example, Colonel North's binders probably contained not only notes that he prepared himself but also a selection of the many documents supplied to him by the committees, and perhaps some other materials. North's lawyers presumably prepared these notebooks based on conversations with their client, their own evaluation of the available documents, and other preparatory activities.
191. See Hickman v. Taylor, 329 U.S. 495, 510-11 (1937); see also Note, Work Product Protection for Compilations of Nonparty Documents: A Proposed Analysis, 66 Va. L. Rev. 1323, 1340 (1980) (arguing that an attorney's compilations of documents in preparation for litigation should receive work-product protection "if they emerge from a selection and arrangement process requiring significant effort on the part of an attorney and resulting in a product of a value greater than that of the documents themselves").
192. One example is a lawyer's collection of documents that contains irrelevant and unhelpful materials calculated to confuse and mislead opposing counsel. See Hickman, 329 U.S. at 511.
selection process constitutes core work product. Courts, therefore, cannot compel lawyers to reveal the methods they employed to select materials for witness preparation.

Courts should also protect from discovery the collection of documents itself. Disclosure of the compilation implicitly reveals the thought processes of the attorney who gathered the documents. Until recently, most practitioners believed that the collection was protected from disclosure, probably because general waiver rules do not compel disclosure of these preparatory collections under the "mere review" rationale. However, several courts have found waiver through the operation of Federal Rule of Evidence 612, which requires disclosure of material used either before or during testimony to refresh a witness's recollection. A witness's review of a document or collection of documents during preparation raises the familiar problem of distinguishing between education of the witness and distortion of the witness's memory. Rule 612 provides the cross-examiner with the opportunity to test the accuracy of the witness's refreshed memory and to assess the writing's capacity to refresh the witness's memory.

The seminal case finding waiver on this theory is Berkey Photo v.


194. See, e.g., Herndon & Karl, supra note 12, at 140 (concluding a demonstration preparation session with: "Leave your witness preparation books with me"); see also Cambridge Indus. Prods. v. Metal Works, Ltd., Dornach, 4 Fed. R. Evid. Serv. (Callaghan) 835, 837 (D. Mass. 1979) (noting that the average practicing attorney could not have anticipated the invocation of rule 612 to material otherwise protected by the work-product privilege).

195. See text accompanying note 168.

196. Federal Rule of Evidence 612 reads in pertinent part:

[I]f a witness uses a writing to refresh memory for the purpose of testifying, either—

(1) while testifying, or

(2) before testifying, if the court in its discretion determines it is necessary in the interests of justice, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

FED. R. EVID. 612.

197. See E. CLEARY, supra note 52, § 9, at 20 (noting that disclosure permits an opponent to test the claim that a witness's memory has been revived and to search for inconsistencies between the document and the testimony); Foster, The Jencks Act—Rule 26.2—Rule 612 Interface—"Confusion Worse Confounded," 34 OKLA. L. REV. 679, 718-19 (1981) (explaining that disclosure and the opportunity to cross-examine provide procedural safeguards). A jury might be equally suspicious of something that is too direct—a note from the lawyer to the witness in an auto-accident case saying, "Remember that the light was green"—or too indirect—a letter from the witness's mother that reminds him of the prime interest rate on April 1, 1978.
Eastman Kodak. In Berkey, Kodak’s counsel prepared notebooks containing important background documents and gave these notebooks to Kodak’s expert economics witnesses. Berkey’s counsel requested copies of the notebooks. Before the enactment of the federal rules, experience with access to preparatory materials was mixed, reflecting the uncertain status of before-testimony refreshment of memory under the common law. Two courts had ordered production, one had refused, and one had hedged. These cases provide little guidance because each involved fact situations significantly different from the others and from Berkey. The Berkey court issued a prospective holding, concluding that protection of such materials would be waived if they were used to prepare witnesses for trial. Judge Frankel indicated that any collection of writings having an impact on the testimony of a witness triggers rule 612 and that rule 612 requires disclosure, even though the collection constitutes core work product. Judge Frankel was disturbed by the potential for a lawyer to “prepare—and thus, very possibly,... influence and shape—testimony,” without providing the opponent an opportunity to examine the preparatory materials.

Immediately after Berkey, a series of opinions followed Judge Frankel’s reasoning. In James Julian, Inc. v. Raytheon Co., officers and employees of James Julian reviewed a lawyer-prepared binder containing selected documents that the company had produced or was willing to produce. The district court held that rule 612(2) effected a waiver and

200. See La Chemise LaCoste v. Alligator Co., 60 F.R.D. 164, 168-69 (D. Del. 1973) (holding that opposing counsel does not have an absolute right to inspect privileged documents used to prepare a witness before a deposition and limiting Bailey to documents used to refresh a witness’s recollection during testimony at the deposition).
201. See United States v. Wright, 489 F.2d 1181, 1189 (D.C. Cir. 1973) (finding a lack of evidence that witness actually used documents for refreshment and declining to reach the issue of whether documents used to refresh witness’s memory before testifying must be disclosed to opposing counsel).
203. Id. at 615-16.
204. Id. at 616; see also Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories, Inc., 81 F.R.D. 8, 10 (N.D. Ill. 1978) (holding that use of privileged documents to refresh a witness’s recollection prior to testimony serves as an effective waiver of the privilege); Bailey v. Meister Brau, Inc., 57 F.R.D. 11, 13 (N.D. Ill. 1972) (concluding that use of work-product documents to refresh a witness’s recollection constitutes a waiver of the work-product doctrine).
205. 93 F.R.D. 138 (D. Del. 1982).
206. Id. at 144.
ordered the lawyers to produce the binder in its entirety. 207 James Julian and cases like it typically rely on an expansive view of the need to cross-examine; they also emphasize accurate fact finding as a trial’s overriding goal. Some of the cases also focus on the possibility that lawyers preparing witnesses may exploit the secrecy of witness preparation by influencing the testimony. 208

As attractive as the Berkey waiver theory may appear, rule 612 is actually a poor candidate for a general waiver rule. The language of the rule is silent on its relation to privilege, and the rule’s history lends no support to an expansive reading. The common-law rule was unclear on the status of refreshing the memory before trial. Usually, there was no absolute entitlement to such materials, although they might be obtained in the trial court’s discretion. 209 A considerable body of opinion had criticized the common-law distinction between at trial and before trial because it was arbitrary and capable of producing bizarre results. 210 Accepting these criticisms, the Advisory Committee included access to writings used “before testifying” in rule 612, but added the caveat that disclosure should occur only “if the court in its discretion determines it is necessary in the interests of justice.” 211 The Advisory Committee specifi-


208. See Boring v. Keller, 97 F.R.D. 404, 407 (D. Colo. 1983) (holding use of attorney’s opinion in formulating expert opinion waives privilege over attorney’s opinion); James Julian, Inc., v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982) (finding that when counsel makes the “decision to educate witnesses,” the other side should have the benefit of disclosure). One of Judge Frankel’s reasons for granting a prospective holding in Berkey was the lack of an intention to exploit secrecy. See Berkey, 74 F.R.D. at 617.

209. See Needelman v. United States, 261 F.2d 802, 806-07 (5th Cir. 1958), cert. dismissed, 362 U.S. 600 (1960); see also Fed. R. Evid. 612 advisory committee’s note (explaining that the judge may have discretion in the matter, even though there is no entitlement to access); Foster, supra note 197, at 719 & n.166 (criticizing the suggestion that the rule of entitlement should be extended to all materials used to refresh a witness’s memory either before or during trial).

210. See, e.g., People v. Scott, 29 Ill. 2d 97, 108-12, 193 N.E.2d 814, 820-22 (1963) (holding that there is no substantial or logical difference between the witness’s use of documents to refresh recollection prior to testimony and the same use during testimony, because “the opportunity for mischief or error is equally present regardless of where or when the inspection of the documents occurs”); State v. Hunt, 25 N.J. 414, 512-29, 138 A.2d 1, 5-10 (1958) (citing State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957), as “unequivocally reject[ing] any distinction” between refreshing recollection before trial and refreshing at trial and quoting Mucci for the proposition that “the one case is as compelling in reason and logic as the other,” id. at 436, 136 A.2d at 767); State v. Mucci, 25 N.J. 423, 430-38, 136 A.2d 761, 766-70 (1957) (concluding that the rule that applies to writings used by the witness before trial should be the same as the rule that applies to writings used by the witness on the stand and holding that the refusal of the trial court to allow inspection by opposing counsel of the documents was reversible error); State v. Deslovers, 40 R.I. 89, 104-06, 100 A. 64, 69-70 (1917) (holding that the trial court erred in refusing to permit opposing counsel to examine a record used to refresh the witness’s memory the morning of testimony).

211. Fed. R. Evid. 612 advisory committee’s note; see also Wheeling-Pittsburgh, 81 F.R.D. at
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cally noted that the rule was worded "to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files."212

The House was more cautious than the Advisory Committee. Concerned over the Advisory Committee's suggestion that the rule "could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial,"213 the House went even further to protect privileges. The House Committee's report said: "The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory."214 As the House Committee intended, rule 612 is structurally subject to rule 501, which recognizes the common-law privileges.215

Invocation of rule 612 requires the establishment of several foundational facts involving the witness whose memory is being refreshed; these required foundational findings are highly unsuited to Berkey's waiver theory. The questioner must establish loss of memory on the part of the witness, the use of a writing by a witness to refresh that memory, the actual refreshing of the witness's memory, and an intention by the witness to use the material for the purpose of testifying. If refreshing the memory occurred in the pretrial stage, the questioner must also show that disclosure is necessary in the interests of justice.216 The very existence of formal prerequisites to disclosure makes the application of rule 612 awkward during discovery, which is intended to function without judicial involvement. The requirement that disclosure be necessary in the interests of justice is particularly troubling because it makes an individualized judicial determination unavoidable. Routine disclosures, therefore, are impractical at the pretrial stage, which is the time when access to the preparatory material would be most useful.217 The text of

10 (characterizing rule 612's "departure from previous practice" as "innovative"); Prucha, 76 F.R.D. at 209 (mentioning the "increasing public interest in full disclosure" as one rationale for rule 612); Foster, supra note 197, at 719-21 & n.166 (emphasizing the proviso on refreshing recollection before testifying).

212. Fed. R. Evid. 612 advisory committee's note.

213. Id.

214. H.R. REP. NO. 650, 93d Cong., 1st Sess. 13 (1973), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7075, 7086; see also 120 Cong. REC. 2382 (1974) (noting that "we come back to the fact that [rule 612] does not wipe out the other sections of the law, or the law as it exists regarding the privilege of attorney-client relationships, or their work products") (remarks of Rep. Hungate).


216. See Fed. R. Evid. 612.

217. Access to document collections is particularly useful to an opponent before trial for two reasons. First, generalized probing about preparation is impractical in the trial setting. It does not lend itself to a controlled, directed cross-examination, and it is unlikely to be tolerated by a judge. Second, much of the information to be gleaned—for example, the opponent's evaluation of the strengths and weaknesses of the case—is especially valuable during trial preparation and discovery, both of which occur before the trial begins.
the rule supports this interpretation, because the required disclosure is to take place "at the hearing" and is for the purpose of cross-examination. Some courts have concluded that rule 612 simply does not apply to deposition testimony, but most courts have reached the opposite conclusion.

As experience with this issue has increased, courts have become increasingly concerned that decisions requiring disclosure were undervaluing and undermining work-product protection and that rule 612 was carrying more weight as a discovery tool than it was meant to bear. Several courts have simply struck a different balance among the rule 612 foundational criteria, still accepting the premise that rule 612 overcomes the privilege. Other courts have subjected each document to "substantial need" scrutiny under rule 26(b)(3).

The Third Circuit has advocated a third approach. Sporck v. Peil involved a collection of preparation documents culled from hundreds of thousands obtained in discovery. The court held, with Berkey, that the document collection was core work product. The court also accepted the proposition that rule 612 can overcome the work-product privilege. However, it differed from Berkey by requiring that the proponent of disclosure lay the necessary rule 612 foundation for each document sought. The court implicitly rejected the idea that all documents reviewed by a nonexpert witness are equally influential on the resulting testimony. It also indicated that disclosure under rule 612 should be limited to the specific documents for which the cross-examiner


222. See, e.g., In re Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4, 5-6 (E.D.N.Y. & S.D.N.Y. 1988) (balancing the interests-of-justice standard of rule 612 with the substantial-need requirement of rule 26(b)(3)); In re Comair Air Disaster Litig., 100 F.R.D. 350, 353 (E.D. Ky. 1983) (concluding that when materials have been used to refresh the memory of the witness before testifying, rule 612 encourages a finding of substantial need under rule 26(b)(3) "because of the policy in favor of effective cross-examination").


224. Id. at 313.

225. Id. at 316.

226. See id. at 317-18.

227. See id. at 318.
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can demonstrate "witness use [of] the document for the purpose of testifying," the second prerequisite of the rule.\textsuperscript{228}

Indeed, if respondent's counsel had first elicited specific testimony from petitioner, and then questioned petitioner as to which, if any, documents informed that testimony, the work product petitioner seeks to protect—counsel's opinion of the strengths and weaknesses of the case as represented by the group identification of documents selected by counsel—would not have been implicated. Rather, because identification of such documents would relate to specific substantive areas raised by respondent's counsel, respondent would receive only those documents which deposing counsel, through his own work product, was incisive enough to recognize and question petitioner on.\textsuperscript{229}

The \textit{Sporck} position is sensitive to the competing doctrinal and statutory commands. It is also sensible policy. When the underlying documents are available to the cross-examiner, one court has said, "the only purpose for ordering discovery [of a document collection] . . . would be to inform [the opponent] of the attorneys' process of selection and distillation of documents."\textsuperscript{230}

In the decade since Judge Frankel's expansive waiver ruling in \textit{Berkey}, courts have moved to a more particularized view of collections of documents by requiring that each purportedly waived document meet the relatively elaborate foundational requirements of rule 612. Nevertheless, both the \textit{Berkey} and \textit{Sporck} lines of authority coexist. Several cases have followed \textit{Sporck},\textsuperscript{231} but \textit{Berkey} and \textit{James Julian} remain valid, cited precedent.\textsuperscript{232} To make matters even more complicated, \textit{Berkey} and \textit{Sporck} are contrary, at least in spirit, to the line of cases holding that inquiry into a witness's oral preparation is improper.\textsuperscript{233} The confidentiality of collections of documents, therefore, remains unsettled. Last year, in fact, the same district court followed \textit{Berkey} in one case and rejected it

\textsuperscript{228}. \textit{Id. at} 317.

\textsuperscript{229}. \textit{Id. at} 318; see also Note, \textit{Interactions Between Memory Refreshment Doctrine and Work Product Protection Under the Federal Rules}, 88 YALE L.J. 390, 404-05 (1978) (arguing that there is never a true conflict because work product does not protect purely factual matters).


\textsuperscript{233}. See supra section II(B)(2).
7. Rehearsals: A Recapitulation.—Most practitioners recommend that lawyers rehearse direct examination and cross-examination with witnesses before a trial or deposition. Rehearsal is one of the most controversial preparation techniques and also "the most strongly advised among trial lawyers." One indication of the importance that lawyers attach to rehearsal is the large amount of time that practitioners recommend be devoted to it; upper estimates, although unrealistic, range as high as fifty or "no limit." Even though trial lawyers are emphatic about the need for rehearsal, they are equally concerned that the witness not appear rehearsed because such an impression harms the witness's credibility. Rehearsal, then, embodies much of the previously discussed conflict in the law applicable to witness preparation.

The most benign purpose for going over the prospective examinations is to relax witnesses by acquainting them with the role of the witness. Rehearsal of the direct examination can supply needed confidence for a rigorous cross. The technical aspects of witness preparation—such as pausing before answers and refusing to limit an answer to yes or no—are of particular importance, because a common technique of cross-examiners is to rattle or anger the witness. The more substantive purpose for rehearsal is to improve the witness's narrative by letting the witness know how the interrogation will proceed and what subjects will be covered. Rehearsal also tells the lawyer what answers to expect.

If the only test for the appropriateness of rehearsal is whether it assists perjury, there is no rational distinction between rehearsal and other substantive preparation, such as suggesting the wording of responses. However, rehearsal has a greater potential for suggestiveness than other preparation techniques. A witness naturally feels apprehensive about an upcoming appearance. The inclination to welcome a script
is strong. Furthermore, repetition of a story is extremely suggestive. Psychologist Follingstad recommends it:

Roleplaying is one of the most important techniques for producing desired testimony, but it requires great patience and specific sequence of practice. While time-consuming, the benefits increase each time roleplaying is practiced. The result of good roleplaying is the development of new skills that appear quite natural. Roleplaying means just that—playing or practicing behaviors.

Inconsistencies can be conformed—often called "ironing out wrinkles" and doubts assuaged. Both can create substantial inaccuracy or baseless certitude.

Rehearsal is in a sense the ultimate witness-preparation technique. It treats the trial precisely as a play scripted by the lawyers. Rehearsal goes beyond providing factual information or documents to familiarize the witness with the subject matter of the upcoming testimony. It is more intensive than simply providing demeanor suggestions. Most important, it comes uncomfortably close to the line between the lawyer's knowing what would help the case and the lawyer's advising the client how to help the case.

C. Conclusion

Legal doctrine alternately protects and restricts witness preparation. The adversary system itself imposes on lawyers the duty to present the best possible case for their clients. This structural imperative is enforced through rules that require full preparation and zealous representation and by privileges that protect preparatory activities from disclosure. Simultaneously, legal doctrine subjects lawyers to direct penalties for certain improper preparation activities and provides for disclosure of such activities to an opposing party if the preparation runs afoul of the rules of evidence and privilege. As a result, the law applica-

240. See J. FRANK, supra note 154, at 86-87; Christiansen, supra note 143, at 706 n.9, 710.
241. Follingstad, supra note 45, at 56 (emphasis added).
242. See McElhaney, supra note 13, at 82.
243. See J. FRANK, supra note 154, at 86.
244. Saltzburg aptly describes this process as a system of incentives and limitations. See Saltzburg, supra note 11, at 657-59.
245. Direct penalties include perjury charges against the witness, charges against the preparing lawyer for complicity in perjury, dismissal of claims or defenses, and professional disciplinary action. See, e.g., 18 U.S.C. § 201 (1988) (bribery of public officials and witnesses); id. § 1505 (obstruction of proceedings before departments, agencies, and committees); id. § 1621 (perjury generally); id. § 1622 (subornation of perjury); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(4) (1981) (asserting that in representing a client, "a lawyer shall not knowingly use perjured testimony or false evidence").
ble to witness preparation is technically complex and substantially am-

III. Witness Preparation in the Adversary System

More than any other area of the law, witness preparation displays
the fundamental conflict between the two primary goals of the judicial
system. The rules designed to remedy the potentially distorting effects
of witness preparation reflect the view that the purpose of the adversary
system is to achieve an accurate application of law to facts—that the
adversary system is a truth-seeking device. On the other hand, the duty
of zealousness and the rules of privilege reflect the view that the adver-
sary system promotes and requires partisan representation, which is val-
ued for its own sake and justified even if it makes the adversary system a
poor finder of facts and applier of laws. The two schools of thought take
conflicting approaches on witness preparation. This Part begins with a
brief review of the two goals of adversary justice. It then examines in
more depth the role of witness preparation in relation to each goal.

A. Two Views of Adversary Justice

Judicial pronouncements, the public perception of the function of
the judicial system, and ethical rules support the view that ascer-
taining the truth is the paramount goal of the adversarial system and the
primary basis for its legitimacy. Some observers fault the adversary sys-

246. This conflict, if overdrawn, conveys the impression that one must choose either a wholly
adversarial or a wholly “inquisitional” judicial system. See Stempel, All Stressed Up but Not Sure
Where to Go: Pondering the Teaching of Adversarialism in Law School (Book Review), 55 BROOK-
LYN L. REV. 165, 186-89 (1989). This Article suggests the coexistence of conflicting goals within
the adversary system.

of the trial”); Nix v. Whiteside, 475 U.S. 157, 166 (1986) (holding that a defendant’s right to take the
stand to commit perjury is inconsistent with “the very nature of a trial as a search for truth”); United
States v. Nixon, 418 U.S. 683, 710 (1974) (discussing the trial as a search for truth); In re
Michael, 326 U.S. 224, 227 (1945) (claiming that a judgment based on truth is the “sole ultimate
objective of a trial”).

248. See Nesson, The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts,
98 HARV. L. REV. 1357, 1358, 1360-61 (1985) (arguing that the legitimacy of jury verdicts depends
on the perception that they are based on reality and not merely on evidence presented in court).

249. See, e.g., MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (1989) (noting
that a lawyer must not participate in the presentation of false evidence or in fraudulent conduct).
Witness Preparation

truth.250 Echoing these concerns, Professors Langbein and Damaska have argued that less partisan continental fact-finding procedures are more likely to reach accurate results.251 Professor Landsman’s interest in the psychology of testimony and recollection leads him to recommend fundamental changes in the relationship between lawyer and nonparty witnesses to counteract the distorting effects of witness preparation.252

The contrasting view is expressed in Lord Brougham’s defense of Queen Caroline: “[I]n the discharge of his duty, [a lawyer] knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty . . . .”253 This oft-quoted argument may be taken as the extreme of a widely held belief that the client stands alone at the apex of a lawyer’s concerns.254 Professor Freedman’s ethical works are other representative examples of the view that a lawyer has a special relationship with a client as the client’s protector and champion against the state or against other individuals.255

250. See J. FRANK, supra note 154, at 86; M. FRANKEL, PARTISAN JUSTICE 15-17 (1980); D. LUBAN, supra note 3, at xx-xxi, 15-16.

251. See Damaska, supra note 154, at 1091-95; Damaska, EVIDENTIARY BARRIERS TO CONVICTION AND TWO MODELS OF CRIMINAL PROCEDURE: A COMPARATIVE STUDY, 121 U. PA. L. REV. 506, 587-88 (1973); Langbein, supra note 83, at 833-35.

252. See Landsman, supra note 159, at 548. Landsman advocates strict limits on lawyers’ access to nonparty witnesses and suggests that all such contacts occur under circumstances similar to those of an informal deposition. See id. at 558-59. He also believes that experts on the psychology of memory should be permitted to testify and that juries should receive appropriate cautionary instructions. See id. at 571-72.


254. See, e.g., MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1 (1980) (emphasizing a lawyer’s duty to represent the client zealously); id. EC 7-4 (asserting that a lawyer “may urge any permissible construction of the law” favorable to the client); ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-1.1(b) (1982) (noting that a lawyer must further a client’s interests to the extent permitted); Gross, THE AMERICAN ADVANTAGE: THE VALUE OF INEFFICIENT LITIGATION, 85 MICH. L. REV. 734, 745-46 (1986) (characterizing a lawyer as “a professional disputer, who will be loyal” to the client); Saltzburg, supra note 11, at 647-48 (describing the view that a lawyer “ow[es] allegiance to the client and [is] an extreme partisan in asserting the client’s interest”). The idea of the lawyer as the champion of the client is not without its critics. See, e.g., Rhode, ETHICAL PERSPECTIVES ON LEGAL PRACTICE, 37 STAN. L. REV. 589, 645-47 (1985) (arguing that a lawyer must consider the ethical implications of representing a client).

255. See M. FREEDMAN, supra note 14, at 4, 9-26; ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-1.1(b) (1982). More or less by necessity, the practical literature accepts the partisan or adversarial role of the lawyer, often to an extreme degree. The Commentary to ABA Standard 4-1.1(b) points out that “included in the defense counsel’s obligations to the client is the responsibility of furthering the defendant’s interest to the fullest extent that the law and the standards of professional conduct permit.” ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 4-1.1(b) comment (1982).

Analogizing lawyers’ roles in civil and criminal cases is dangerous. For numerous constitutional and policy reasons, the counsel for a criminal defendant has greater leeway when confronted with the power of the state. See Langbein, supra note 83, at 842-43; Luban, supra note 47, at 91-93; Schwartz, THE ZEAL OF THE CIVIL ADVOCATE, 1983 AM. BAR FOUND. RES. J. 543, 548-50. But see
One may deduce from the lawyer-as-champion position that trials are not essentially exercises in fact finding or truth seeking. Instead, they are social and political mechanisms for resolving disputes. Truth is valued, but its importance is only a part of the larger adversarial framework. “[F]ar more than a search for truth,” a trial is a vindication of the rights of the individual and a ritual for the peaceful resolution of disputes among members of society.256 In discussing the preparatory witness conference, one commentator notes that “this essential and thoroughly professional preparatory conference can only be taken as having nothing whatever to do with Truth.”257 In this view, the basic legitimacy of witness preparation is rooted in the nature of adversarial fact development and the character of the adversarial tribunal. Witness preparation is a corollary of the protective relationship between lawyer and client; it must be permitted even at the risk of inaccurate testimony.

Both schools of thought strongly influence the American judicial system,258 and the frequently conflicting goals of truth seeking and partisan representation create tensions within the system. These tensions, which are especially obvious in witness preparation, are largely responsible for the awkward and confusing position of witness preparation in our legal system today.259

B. Justice as Accuracy

1. Half-Truths.—The adversary theory of fact finding presupposes that the truth will best be found by the clash of two or more versions of reality before a neutral tribunal. The parties explore the factual basis of a case and present it to the court. The court in this model merely facili-

Saltzburg, supra note 11, at 659-61 (rejecting the view that lawyers' roles differ fundamentally in civil and criminal cases).

256. M. Freedman, supra note 14, at 2; see also G. Hazard, supra note 47, at 129 (“The real value of the adversary system thus may not be its contribution to the truth but its contribution to the ideal of individual autonomy.”); Saltzburg, supra note 11, at 654-55 (noting that the goal of the adversary system is not primarily to search for the truth but “to apply the substantive legal principles so that those who have rights may claim them and those who have liabilities must face them”); Tribe, Trial by Mathematics: Precision and Ritual in the Legal Process, 84 Harv. L. Rev. 1329, 1376 (1971) (“It would be a terrible mistake to forget that a typical lawsuit, whether civil or criminal, is only in part an objective search for historical truth. It is also, and no less importantly, a ritual . . . .”).

257. Uviller, supra note 129, at 1073.

258. Judge Frankel, for example, would “modify (not abandon) the adversary ideal.” Frankel, supra note 129, at 1052; see also S. Landsman, The Adversary System: A Description and Defense 3 (1983) (“The judicial process is generally used to satisfy two objectives: first the search for truth, and second, the resolution of disputes between contending parties.”).

259. Cf. Saltzburg, supra note 11, at 650, 687 (arguing that if goals of the adversary system were clearer, lawyers could more easily determine the proper course of action in an ethically complex situation).
tates the parties' exploration and presentation.\textsuperscript{260} Each side has a strong incentive to discover and present all facts and arguments in its favor.\textsuperscript{261} The temptation to omit unfavorable evidence is balanced by the adversary's incentive to rebut arguable facts, fill gaps, and refute fallacious arguments.\textsuperscript{262} The trier of fact then decides the matter by comparing the "fit" of the adversaries' alternative explanations with its own observations.\textsuperscript{263}

Because witnesses' observations are presented in support of one of the proposed explanations, they may be unreliable. The most frequently discussed failing of the adversary system as a truth finder might be reduced to the slogan that two half-truths do not make the whole truth. Parties have no obligation to present the whole truth,\textsuperscript{264} and in the ordinary case one party wants \textit{not} to present or even discover some part of the facts,\textsuperscript{265} neither party \textit{knows} the whole truth,\textsuperscript{266} or both. Even if the


Saltzburg argues that the incentive to win is the "key to understanding the adversary system." Saltzburg, supra note 11, at 659. This approach should not be confused with the "sporting" or "fight" theories of justice, which many commentators have denounced. See J. FRANK, supra note 154, at 80-81 (discussing the "fight" theory versus the "truth" theory); R. POUND, THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 12-14 (American Judicature Soc'y ed. 1956) (noting that "[t]he idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point").

\textsuperscript{262} For an excellent general description of the adversary system and its traditional justifications, see G. HAZARD, supra note 47, at 121-35; Fuller, supra note 261, at 30-43. As several commentators have noted, however, this approach assumes that both sides have equal resources, a premise which is often unjustified. See, e.g., Rhode, supra note 254, at 609-11 (describing our society as one "marked by grossly unequal access to legal services").

\textsuperscript{263} To use Professor Freedman's example, patients seek a second opinion in medicine because it is useful to see whether a plausible argument can be made for a different view, regardless of whether they perceive a defect in the original view. See Freedman, Judge Frankel's Search for Truth, 123 U. PA. L. REV. 1060, 1060-61 (1975); see also Barrett, The Adversary System and the Ethics of Advocacy, 37 NOTRE DAME L. REV. 479, 480-81 (describing the use of a "devil's advocate" at canonizations whose duty it is to present all possible arguments against the candidate); Levine, Scientific Method and the Adversary Model: Some Preliminary Thoughts, 29 AM. PSYCHOLOGY 661, 674 (1974) (arguing that "[b]y laying out arguments in detail, we may be persuaded by the weight of evidence brought to bear either in favor or against some proposition"). \textit{But see} Gross, supra note 254, at 742 (concluding that the arguments for the superior accuracy of adversarial factfinding are illogical or unproven); Youtz, Some Comments on "Scientific Method and the Adversary Model," 29 AM. PSYCHOLOGY 714, 715 (1974) (contrasting law and science in the search for facts).

\textsuperscript{264} See G. HAZARD, supra note 47, at 41.

\textsuperscript{265} See, e.g., J. FRANK, supra note 154, at 87 (noting an English lawyer's comment that "in litigation, 'one party or the other is always supremely interested in misrepresenting, exaggerating or suppressing the truth'"); M. FRANKEL, supra note 250, at 76 (asserting that "lawyers do indeed spend a lot of time seeking to block or distort the truth"); Damaska, supra note 154, at 1093 (maintaining that it may be in the interests of the parties "that some items of information . . . do not reach the adjudicator"); Frankel, supra note 129, at 1039 (describing litigators as gladiators "not primarily crusading after truth, but seeking to win"); see also Luban, supra note 47, at 94 (noting that the opposing lawyers are obligated "to present the facts in the manner most consistent with their client's position" by methods that include the prevention of introduction of unfavorable evidence).
parties know all the facts and do not want to suppress any of them, at the 
very least each will emphasize some facts at the expense of others, creat-
ing a highly selective version of the truth.

Witness preparation intensifies the half-truth problem. Lawyers 
commonly advise witnesses to avoid, if possible, certain factual areas in 
their testimony, because opposing counsel might not think to explore 
these troublesome areas. Similarly, a lawyer may choose not to call a 

witness because the lawyer knows from preparation that the witness has 
knowledge of a sensitive area.

In theory, the adversary system remedies this problem by providing 
incentives to lawyers to fill the gaps in each other's presentations. But 
there is little reason to believe that these incentives work well. First, the 
incentive to present a favorable story can pressure a lawyer into creating 
a favorable story or suppressing an unfavorable one. Second, some 
experimental data suggests that the adversarial incentives work only in 
the limited situation in which counsel believes that the case will be lost 
and urgently needs to find something helpful. Otherwise, once a stable 
view of the case emerges, diligence in fact finding declines. This obser-
vation suggests that a major incentive for trial preparation is to obtain 
support for an uncertain version of the facts and not to confirm a version 
of the facts that appears to represent the whole truth. Witness prepara-
tion, which is part of trial preparation, interferes with truth seeking in 
this way, as well.

2. Distortion of Memory.—Deliberate creation of untrue testimony 
is clearly illegal and unethical; the difficult ethical problem involves what 
Judge Frank has called "inadvertent but innocent witness-coaching." There is enormous pressure on a partisan advocate to produce a story 
favorable to the client. The client expects a champion and presumably

266. See Uviller, supra note 129, at 1067 (concluding that, where neither side accurately knows 
the facts, the adversarial process "serves as one of the better methods of reconstruction").

267. See Fed. R. Evid. 611(b) (addressing the scope of direct examination and credibility).


269. See Sheppard & Vidmar, Adversary Pretrial Procedures and Testimonial Evidence: Effects 
of Lawyer's Role and Machiavellianism, 39 J. Personality & Soc. Psychology 320, 331 (1980).

270. See Lind, Thibaut & Walker, Discovery and Presentation of Evidence in Adversary and Non-
adversary Proceedings, 71 Mich. L. Rev. 1129, 1140-43 (1973); see also J. Thibaut & L. Walker, 
Procedural Justice: A Psychological Analysis 28-40 (1975). The usefulness of these studies, which were conducted by psychologists using college students, has been questioned in the legal 
literature. See e.g., Damaska, supra note 154, at 1095-100 (arguing that studies employing a passive 
decision maker do not accurately replicate a nonadversarial system of justice); Gross, supra note 254, 
at 740 & n.22 (arguing that college and law students are not adequate substitutes for judges and 
lawyers in evaluating the roles of these professionals).

271. J. Frank, supra note 154, at 86.
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expects success. The competitive nature of the adversary system also encourages lawyers to internalize the desire to win. Because witness preparation typically occurs after lawyers have committed themselves to clients and have developed a specific adversary posture and objective, lawyers have strong incentives to use witness preparation to encourage a favorable story. Witness preparation afford[s the lawyer] the opportunity to shape the witness’s testimony, often to the point of recreating it in an image closer to that which the lawyer desires than to that which the truth requires. Ethical questions arise particularly since preparation of one’s own witness for trial is hardly, under our adversary system, a public ceremony. It is entirely possible for witnesses to remain unaware that they are being manipulated; therefore, the resulting testimony can be subjectively candid, but objectively wrong.

Inadvertent pressure by lawyers is only half the problem. A witness can be subjectively candid in providing incorrect testimony because witness preparation can distort the witness’s underlying memory. Memory is not like a phonograph record; the perception of an event does not leave a single, clear imprint that can be replayed precisely and at will.

272. See M. FRANKEL, supra note 250, at 63; G. HAZARD, supra note 47, at 134. This characteristic of the adversary system makes it attractive to participants. See J. THIBAUT & L. WALKER, supra note 270, at 118-19 (1975).

273. See G. HAZARD, supra note 47, at 133; see also M. FRANKEL, supra note 250, at 78 (noting that a lawyer’s personal rapport and sympathy with the client may encourage over-zealous representation); Berg, supra note 2, at 13 (characterizing the desire to win as the practitioner’s “raison d’être”); Rhode, supra note 254, at 598 (asserting that the adversarial system often generates an ethos that is an obstacle to truth). Other incentives include retaining “repeat customers” by acceding to perjurious demands. Cf. G. HAZARD, supra note 47, at 132 (noting that repeat customers are usually under a retainer with the attorney, creating a “dependent and intimate” relationship).

An experiment with law students showed that students who agree with the principles of the adversary system tend to exhibit a manipulative personality profile and to use coercive, deceptive, and manipulative interrogation techniques significantly more than their colleagues. See Stark, supra note 4, at 419-20. Apparently, some manipulative behavior was intentional and some was not, see id. at 419 n.20; however, the instructors had assigned the students reading materials on the legality, ethical propriety, and tactical use of various witness preparation techniques. See id. at 415 n.10.

274. Cf. Stark, supra note 4, at 410.


276. See Sheppard & Vidmar, supra note 269, at 328-29. The manipulative personality is called Machiavellian (or Mach) in psychological literature.

277. See I. ROSENFIELD, THE INVENTION OF MEMORY: A NEW VIEW OF THE BRAIN 3 (1988). This book is about a myth that has probably dominated thought ever since human beings began to write about themselves: namely, that we can accurately remember people, places, and things because images of them have been imprinted and permanently stored in our brains; and that, though we may not be conscious of them, these images are the basis of recognition and hence of thought and action. Id. The imperfection of memory is legal common knowledge. See Gardner, supra note 151, at 401 (“Imagination and suggestion are twin-artists ever ready to retouch the fading daguerreotype of memory.”); Hutchins & Sleisinger, Some Observations on the Law of Evidence—Memory, 41 HARY. L. REV. 860, 867-69 (1928) (discussing past recollection and present recollection revived); Kubie.
There are, roughly speaking, three stages of memory: perception, coding and storage, and retrieval.\textsuperscript{278} It is generally agreed that perceptions of eyewitnesses, for all the weight they are given, are nevertheless highly unreliable.\textsuperscript{279} This is initially a problem with perception itself, which is a highly selective process and, because it is selective, subject to bias and distortion.\textsuperscript{280}

While perceptual distortions may affect the ultimate accuracy of the testimony, witness preparation cannot affect the original perception. However, the same processes of selection and bias affect all subsequent stages of memory. Witness preparation can affect the latter stages of

\textit{Implications for Legal Procedure of the Fallibility of Human Memory}, 108 U. Pa. L. Rev. 59, 61-66 (1959) ("What we call 'memory' actually consists of several components, each of which is vulnerable to distortion.").

\textsuperscript{278} See A. TRANKELL, \textit{supra} note 93, at 13-29; Broadbent, \textit{Communication Models for Memory}, in \textit{THE PATHOLOGY OF MEMORY} 167, 167-71 (G. Talland & N. Waugh eds. 1969) (presenting a model of four stages of memory: perceptual memory storing, coding or categorization, storing of coded or categorized information, and long-term storage); Kubie, \textit{The Preconscious Factors in the Process of Remembering}, in \textit{THE PATHOLOGY OF MEMORY} 237, 242-44 (1969) (dividing psychological processes into "ingredients"); Kubie, \textit{supra} note 277, at 61-64 (concluding that the recording, storing, and reproducing of experience are influenced by selective preconscious and unconscious influences); Landsman, \textit{supra} note 159, at 550-53 (characterizing the stages as acquisition, retention, and retrieval). \textit{Cf.} M. FREEDMAN, \textit{supra} note 14, at 64-65 (asserting that the idea that memory is a process of recollection or reproduction of impressions is a misconception, because memory is more a process of reconstruction).

The obvious analogy is to the function of a computer, input-storage-computation-output, though this paradigm antedates computers. The physiological accuracy of this model of the brain has been seriously challenged in recent years, principally by a theory called neural Darwinism proposed by Gerald Edelman. \textit{See I. ROSENFIELD, \textit{supra} note 277, at 156-57, 189. In Edelman's view, memory consists of procedures and organizations of perception. The brain develops these structures to enable it successfully to adapt (hence "Darwinism") to its environment. Memory is a reorganization of available materials, and hence inherently unstable. \textit{See generally id. at 170-95 (providing an accessible account of neural Darwinism).}

The full implications of neural Darwinism for evaluating testimony will require further exploration, but in practice it seems to provide a biological explanation of previous observations of idiosyncratic perception and reconstructive memory. Indeed, Rosenfield suggests that Edelman confirms the 1932 conclusions of F.C. Bartlett that memory is "not the re-excitation of innumerable fixed, lifeless and fragmentary traces," but "an imaginative reconstruction..." \textit{Id. at 192-93 (quoting F. BARTLETT, \textit{REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY} 213 (1977)). This view of memory tends to break down any meaningful biological distinction between perception and memory. \textit{See id. at 135-36. Nevertheless, since the observations and not their explanation are of primary importance here, this Article will retain the observational terminology of the traditional model.}


\textsuperscript{280} If the perceiver has a stake in the outcome, awareness of this stake has an obvious biasing effect. \textit{See M. VERNON, \textit{THE PSYCHOLOGY OF PERCEPTION} 206 (1962). More subtly, the perceiver, who understands the event in terms of past experience and attitudes, may conform the perception to fit them. \textit{See F. BARTLETT, \textit{REMEMBERING: A STUDY IN EXPERIMENTAL AND SOCIAL PSYCHOLOGY} 33 (1977) (concluding that interests and attitudes often "direct the course and determine the content of perceiving"); A. TRANKELL, \textit{supra} note 93, at 13-20 (discussing the influence on perception caused by a witness's subjective expectations or physical limitations). Most perception involves inference from the small part of the external event that the brain actually registers. Inference inevitably introduces elements such as attitudes, personal preferences, and past experience into the perception itself. \textit{See id.; see also Moore, \textit{Elements of Error in Testimony}, 28 OR. L. REV. 293. 293-95 (1949) (examining the errors produced by cultural bias stereotyping).}
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memory by influencing a witness's coding and storage mechanisms or by manipulating a witness's retrieval process.

Coding and storage is not a simple process. It begins with the decision, involving hundreds of unconscious decisions, about what to store, that is, what is significant or important. These decisions are also based in part on past experience; to that extent, they will be idiosyncratic. Psychologists assume that storage involves coding or categorization of images, a process that necessarily requires further individual selectivity and experiential bias. Categorization is apparently the process that permits the correlation in stored memory of earlier and later occurring images of a similar nature. Correlation makes retrieval of stored memory possible, but it also permits the conflation of similarly categorized memories, a process that intensifies with the passage of time.

Consequently, even spontaneous recollection—the third stage of memory—generates a highly selective retrieval of images, due in large part to the earlier categorization and labeling. An individual's personal characteristics, interests, experiences, and emotional reactions to past and present events heavily influence recollection. An individual's emotional association with the event being recalled and the mind's importation of other elements to rationalize and organize a memory add elements from other occurrences into any single recollection.

282. See Kubie, supra note 277, at 64-65. Neural Darwinism holds that there are no a priori categories of experience in the brain; therefore, perception and memory inevitably rely on other experiences to understand and retain the one being observed, see I. Rosenfield, supra note 277, at 62-63, 66, or the brain creates its own, see id. at 112-13, 155. Accordingly, neural Darwinists prefer to think in terms of "generalization" rather than "categorization" of past experiences. See id. at 62, 64, 95.
283. See Broadbent, supra note 278, at 167-68 (maintaining that the second essential stage in memorization is "coding or categorization"); Kubie, supra note 278, at 64-65 (discussing the process of classifying experiences in categories as an essential step in creating memory "links"); Posner, Representational Systems for Storing Information in Memory, in THE PATHOLOGY OF MEMORY, supra note 278, at 173, 177-78 (discussing the importance of the "coding" process in memory).
284. See A. Trankell, supra note 93, at 20-24; Loftus, supra note 281, at 570-71; Posner, supra note 283, at 176-78.
286. See F. Bartlett, supra note 280, at 213-14; I. Rosenfield, supra note 277, at 72-74. The emotional associative power of the mind is, for example, a cornerstone of Freudian analysis. See id. at 72-80.
287. See F. Bartlett, supra note 280, at 84-89 (describing the process of rationalizing memory by importation); I. Rosenfield, supra note 277, at 76-80 (asserting that there are no specific recollections in our brains, but only the means for organizing past impressions).
Recollection, in sum, is an “imaginative reconstruction” of past occurrences from diverse elements present in the memory.288 Hobbes, apparently, was not far wrong: “Imagination and Memory are but one thing, which for divers considerations hath divers names.”289

If the unaided or undirected recollection is this malleable, the capacity for influencing it is enormous. Even if asked general, neutral questions, the witness repairs incomplete perception or memory either by pure invention or by “logical” interpolation. Apparently nonconforming or inconvenient facts can unknowingly be suppressed, altered, or substituted.290 The preparer may subtly encourage the witness to take sides, so that the witness’s own biases will facilitate a favorable reconstruction of the event.291 Even without partisan motivations, people commonly try to please their audience. Thus, the witness will try to please the lawyer during witness preparation, who in turn will further encourage and reinforce the helpful tendencies in the witness’s story.292

Studies of interrogation techniques have uniformly demonstrated the distorting effects of suggestive questioning. Recollection is largely in the control of the pretrial interrogator, who can determine the areas of memory that will be called upon and suggest the contents of that memory.293 Distortion can occur along two axes: the substantive content of the memory and the certainty with which the memory is held.294 The second is as dangerous as the first. If the facts are in dispute, their resolution may be much easier if witnesses on one side recognize and commu-

288. F. BARTLETT, supra note 280, at 213-14 (emphasis added); see also M. FREEDMAN, supra note 14, at 65-68 (describing the process of remembering as a creative reconstruction which can be influenced by the form of the question asked and the witness’s perception of what is in the witness’s best interest); Koenstler, supra note 285, at 265 (“Recalling the experience requires dressing it up again.”); Kubie, supra note 278, at 238 (noting that the underlying process of remembering is carried on preconsciously by rejecting or forgetting selected data).


290. See Damaska, supra note 154, at 1094. Freedman gives the example of John Dean, who during the Watergate hearings relocated a meeting from the Mayflower Doughnut Coffee Shop in the Statler Hilton Hotel to the Mayflower Hotel, even though he had every incentive to be accurate. See M. FREEDMAN, supra note 14, at 66. Kubie reports that Charles Darwin found that he often forgot evidence that seemed to argue against his theories. See Kubie, supra note 277, at 68.

291. See 2 F. BUSCH, LAW AND TACTICS IN JURY TRIALS §§ 528-529 (1959); see also J. FRANK, supra note 154, at 86 (discussing “inadvertent but innocent witness-coaching”). Indeed, mollifying the witness and developing a good rapport—part of which involves convincing the witness of the justness of the client’s cause—is an essential function of witness preparation. See J. SONSTENG, supra note 95, at 21; see also G. BELLOW & B. MOULTON, supra note 13, at 231 (“The relationship between counsel and the witness becomes a central element of what is presented at trial.”).

292. See M. FREEDMAN, supra note 14, at 67; A. TRANKELL, supra note 93, at 26-29.

293. See Landsman, supra note 159, at 554-56. According to one commentator, “Imagination and suggestion are twin-artists ever ready to retouch the fading daguerreotype of memory.” Gardener, supra note 151, at 401.

294. See M. FREEDMAN, supra note 14, at 67-68; Marcus, supra note 57, at 1644 & n.205.
nicate the uncertainty of their recollections. Presuppositions or assumptions in questions, even if entirely baseless, are remarkably successful in creating new, false recollections. For example, using "the" instead of "a" in the question "Did you see the train?" can induce entirely false recollections of the train's existence or increase the certainty of related details. Similarly, use of the word "smashed" instead of "hit" can increase the reported speeds of colliding automobiles. A "memory" created in this way can become permanent, and the witness may strongly believe that it is absolutely true, making successful cross-examination far more difficult.

Suggestive interrogation of witnesses for the purpose of witness preparation may be the rule rather than the exception. One study has shown that law students committed to the adversary system will attempt it. The author of a witness-preparation handbook frankly acknowledges the effect of witness preparation:

There is no doubt that this exercise will have an impact upon the witness's testimony. Witness preparation has the effect of shaping the testimony, focusing on the significant, dropping the irrelevant, emphasizing helpful points, and structuring the presentation to minimize the damage caused by adverse information.

These are the traditional justifications for witness preparation, and stated this way, they seem innocuous enough. But as the passage continues, the less attractive side of witness preparation becomes apparent:

This is the process envisioned by the adversary system. It is not your job to bring all the facts to the attention of the jury, nor is it your duty to play an impartial role. . . . [Y]our emphasis in witness preparation should be designed to present the facts in the light most favorable to your side.

The result of witness preparation, in other words, can be something much more substantively convenient and certain than the witness's original memory warrants.

Distortion of witness recollection is a serious problem partially because it is often not recognized as a problem. Practitioners, who ought to be in the best position to confront the problem, tend either to dismiss it—

295. See Loftus, supra note 281, at 563, 571; see also Gardner, supra note 151, at 403-05.
297. See id. at 117-19; Loftus & Zanni, Eyewitness Testimony: The Influence of the Wording of a Question, 5 BULL. PSYCHONOMIC SOC'Y 86, 88 (1975).
298. See J. FRANK, supra note 154, at 86; A. TRANKEll, supra note 93, at 27-29; Damaska, supra note 154, at 1094; Sheppard & Vidmar, supra note 269, at 322, 329.
299. See Stark, supra note 4, at 416-20.
301. Id.
calling the problem "self-limiting"—or to assume an easy answer—concluding "the ethical lawyer . . . will naturally . . . guide [the] client toward the avoidance of incorrect recollection and characterization."

Thus, the practical literature either ignores the problem or raises the issue and merely exhorts readers to be ethical. Worse, much of the practical literature emphasizes a truthful "manner" or the "appearance" of candor. Even though these texts without exception advise that the witness should also be, in fact, truthful and candid, there is more than a hint here of the Machiavellian principle that one should be virtuous, but failing that, appear virtuous.

In two significant respects, presentation of half-truths and the distortion of memory, witness preparation seriously undermines the important truth-seeking goals of the adversary system. Moreover, both problems inhere in witness preparation that is entirely legal and ethical. Accordingly, those who identify accuracy as the primary goal of the judicial system have ample reason to seek to limit witness preparation to the extent possible.

C. Justice as Advocacy

The adherents of the partisan-representation school of thought recognize the truth-frustrating aspects of the judicial system, but they conclude that such results are inherent in an adversarial system. As previously discussed, the adversary system furthers other goals—such as autonomy and vigorous representation—that many observers value more highly than accuracy. This subpart discusses the two principal structural

302. McElhaney, supra note 13, at 84.
303. Summit, supra note 13, at 505 (emphasis added).
304. McElhaney speaks of "ironing out" difficulties in testimony, but warns against "polishing." McElhaney, supra note 13, at 82.
305. See, e.g., M. Dombroff, Dombroff on Unfair Tactics 86-87 (2d ed. 1988) (recommending that counsel brief the witness on "over-all parameters of the deposition and substantive questions which may be expected"); I. Goldstein, Trial Technique 266 (1935) (noting that rehearsing will allow a witness to testify in "an easy, natural and favorable manner"); J. Kestler, supra note 3, at 330, 332 n.55 ("It is crucial to create a proper image of trustworthiness."); J. Sonsteng, supra note 95, at 22, 213 (providing examples of how to make the witness appear honest); Parnell, supra note 44, at 54 (suggesting that selection of witnesses be based on whether "they can give an impression of trust and sincerity").

It is not, therefore, necessary for a prince to have all the above-named qualities [faith and integrity], but it is very necessary to seem to have them. I would even be bold to say that to possess them and always to observe them is dangerous, but to appear to possess them is useful.

Id.

One striking example, Dombroff on Unfair Tactics, purports to be a guide to combatting unfair tactics, but often reads more like a road map to their effective use. See M. Dombroff, supra note 305, at 44-45, 53, 71, 131, 134; see also Rieger, supra note 148, at 1439 (criticizing Dombroff's book for focusing on purely tactical issues without considering the underlying ethical problems).
characteristics of the American judicial system that appear to necessitate witness preparation.\textsuperscript{307}

1. \textit{The Passive Tribunal}.—The tribunal in the adversary system comes "to the hearing with an open and neutral mind,"\textsuperscript{308} ignorant of the facts and circumstances of the case it is to decide. From the tribunal’s point of view, this system demands that the parties present all the evidence needed to reach a decision anyway. The tribunal has little power to gather information on its own and usually does not know enough about the case to investigate competently. The parties have more information about the transaction than the tribunal ever will. This characteristic necessitates and encourages complete and zealous fact gathering, because each side is eager to discover as much favorable information as possible to present to the tribunal.\textsuperscript{309}

The adversarial lawyer must first choose what will be presented to the court—which elements of proof and which witnesses. The lawyer must then prepare the chosen witnesses to ensure that they present relevant facts and that their presentation is coherent and organized.\textsuperscript{310} The lawyers, rather than the court, must decide in the first instance what is relevant.\textsuperscript{311} The court can decide relevance only negatively and only within the universe of facts presented by the parties.

A lawyer cannot simply gather vaguely relevant material, throw it into a basket, and hand it to the court. Even if the tribunal could afford the time for such a presentation, a naive trier of fact would in many cases be unable to sort it out.\textsuperscript{312} Assisting the trier of fact by sifting and arranging the facts is most important in cases tried to juries, who may be less adept at understanding and analyzing complicated factual situations than judges. But to some degree, sifting and arranging are essential in all cases. Simplification of even the most complex case to a very few basic

\textsuperscript{307} But see Schwartz, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. Pitt. L. Rev. 703, 707-11, 716 (1989) (challenging the current relevance of these characteristics).

\textsuperscript{308} \textsc{Model Code of Professional Responsibility EC 7-19} (1981). \textit{See generally} Fuller, \textit{supra} note 261, at 35-48 (discussing the philosophy of adjudication); Landsman, \textit{supra} note 258, at 2-51 (providing a brief history and analysis of the adversary system).

\textsuperscript{309} The structure of the adversary system may also be expressed in terms of control over the evidence presented. The adversary system gives a high degree of control to the parties, while continental systems place control in the hands of the tribunal. \textit{See J. Thibaut \& L. Walker, supra} note 270, at 24-27, 118-19.

\textsuperscript{310} This description may not always be accurate in practice. \textit{See supra} text accompanying notes 269-270.


\textsuperscript{312} \textit{See United States v. Ouimette, 753 F.2d 188, 192 (1st Cir. 1985).}

\textit{See Frankel, supra} note 129, at 1041-45.
themes—to "a single sentence," one writer commands—can create a clear presentation that is ultimately more persuasive. To achieve this level of organization, lawyers must control witnesses on direct examination. Lacking the powerful tool of leading questions on direct, such control is virtually impossible without prior preparation.

What is true of coherence is also true of accuracy. When the transaction at issue is complex, a witness will require some assistance to recall events correctly. Completeness and accuracy of testimony can be assured only by pretestimony review, that is, witness preparation. Returning to the Iran-Contra example, Sullivan would have done an enormous disservice both to his client and to the committees if he had let North testify without extensive preparation. Without preparation, North would have recalled far less information with far less accuracy. As Sullivan and North repeatedly asserted, preparation was as essential to the committees' fact-finding goals as it was to North's desire to be a persuasive, believable witness.

Another prominent feature of the adversarial fact-finding process is that trial is a continuous event. Weeks, months, or years of preparation are compressed into a relatively brief presentation by each party. The trial, therefore, is a fundamentally theatrical event, in the sense that its outcome depends on the quality of the presentations of the parties, as well as the underlying merits of the dispute. Spontaneous recounting of an event, especially a complex one, is not feasible. One judge advises lawyers,

Like the rest of us, [witnesses] lose memory with time, become emotionally involved with what happened and recount events accordingly. They have trouble organizing their thoughts into relevant and coherent categories and have difficulty verbalizing their recollections. If counsel puts a witness on the stand without ade-

314. A different view is exemplified by the majority in the Supreme Court's recent decision in Perry v. Leeke, 109 S. Ct. 594, 595-96 (1989). The Court upheld a trial court's refusal to permit a defendant to consult his attorney between direct examination and cross-examination. Id. at 602. The majority believed that cross-examining the witness after direct examination, without the benefit of his attorney's advice, better serves "the truth-seeking function of the trial." Id. at 601. The dissent argued that a relaxed, composed witness is more likely to be accurate. See id. at 605-07.
315. See Iran-Contra Hearings, supra note 1, at 3-4, 238.
316. Aron & Rosner begin their book, How to Prepare a Witness for Trial, with this theatrical analogy. See R. Aron & J. Rosner, supra note 2, at 3-4, 263; see also J. Sonsteng, supra note 95, at 27 (stating that "the attorney directs this play using actors and actresses as witnesses"); Summit, supra note 13, at 504 (referring to notes and files as "props").

The Supreme Court in Geders v. United States emphatically rejected the notion that the judge is a mere moderator and the trial a play. 425 U.S. 80, 86 (1975). The Court is clearly correct, but it attacks a straw man. The Court did not deny, nor could it, that the vast bulk of the responsibility for substantive development of the case rests with counsel and not the court. See id.
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quate preparation, the testimony will suffer from these infirmities. 317

Common sense suggests that, to improve recollection, witnesses should think carefully about the substance of the testimony before testifying. This careful consideration is the function of witness preparation. Judge Frankel has rightly questioned "our rigid insistence that the parties control the evidence until it is all 'prepared' and packaged for competitive manipulation at the eventual continuous trial," 318 but the continuous nature of trial makes packaging and preparation a necessity. 319

Professor Landsman recommends that the ill effects of witness preparation be remedied by permitting counsel to interview nonparty witnesses only under deposition-like conditions. 320 Landsman wisely sidesteps the obvious attorney-client privilege problem by omitting parties and clients from his plan, but this omission means that it is a remedy of limited effect. Even in its narrow application, the Landsman procedure assumes that because thorough witness preparation involves only a lawyer's questions and a witness's answers, it is amenable to a quasi-public, recorded setting. In fact, much of the reality and value of witness preparation involves assisting the witness to reconstruct what occurred; 321 it requires the testing of hypotheses against other sources of facts, prior statements, other witnesses' statements, or documents. 322 Before and after Hickman, courts have recognized that witness preparation requires privacy. 323 Even if a lawyer was willing to go through this

318. Frankel, supra note 129, at 1054.
319. Under the continental alternative, in which the fact finder gathers and sorts out the evidence on its own, the tribunal remains involved over a long period of time and the proceeding tends to move slowly. See Landsman, supra note 258, at 49. While this approach improves the fact finder's familiarity with the case and enhances the ability of the fact finder to develop its own views about the facts, it is a process wholly unsuited to the adversary system as we know it.
320. See Landsman, supra note 159, at 556-65. He also suggests cautionary jury instructions, see id. at 571, and routine admission of expert psychological testimony on the subject of witness memory and its distortion. See id. at 564 n.96, 572. The latter suggestion is obviously unfeasible. Trials would involve an endless array of psychological experts, whose presentations would make trials extremely complicated.

The length, complexity, and expense of trials would dramatically increase. The jury, already struggling to comprehend substantive legal rules that lawyers and law professors barely understand and substantive factual issues that experts disagree on must come to grips with psychological theory (as to which the parties will, no doubt, present opposing viewpoints) and even more instructions from the judge.

321. Reconstruction, of course, is also the process that makes recollection subject to bias. See supra text accompanying notes 288-289.
322. Saltzburg criticizes the Landsman proposal because it inhibits early, informal investigation; discourages free, candid discussion by witnesses; and sacrifices the important benefits of well-prepared witnesses. See Saltzburg, supra note 11, at 685-86.
323. See United States v. Jones, 542 F.2d 186, 208-10 (4th Cir.), cert. denied, 426 U.S. 922 (1976) (concluding that counsel ordinarily wants to and is entitled to interview non-client witnesses in private). Lawyers unquestionably expect private interviews with non-client witnesses. See, e.g.,
process on the record, a likelihood that is vanishingly small, a transcript of such a session would be utterly misleading. Without any intent to deceive, several contradictory versions of the same events would appear, giving a future cross-examiner a field day. This result would discourage lawyers from thoroughly preparing witnesses, as Hickman predicted. Trials would be longer and less comprehensible, containing less intelligent testimony from incompletely informed witnesses.

2. Partisan Fact Development.—The partisan advocate's job requires more than gathering facts for the tribunal. The lawyer, as the servant of one of the parties, must put a great deal of effort into the development and presentation of the facts to persuade the tribunal of the justness of the client's cause. The adversary system's pressure to prepare witnesses comes not only from the representative role of the lawyer and the client's expectations that flow from it, but also from a pragmatic assessment of the opponent's likely actions in such a system. Since partisan preparation is permitted, one must assume that the other side will engage in it. The preparation that is an institutional necessity in relation to the trier of fact is also a strategic duty in relation to the client.

In preparing to advise the client, a lawyer's first responsibility is to conduct a complete investigation. This factual inquiry may include a myriad of activities. At the core of the inquiry, the lawyer must probe the memories of all potential witnesses to ensure complete recollection of the relevant facts. Some commentators have suggested that there is a conflict between accuracy and completeness in memory. A minimally prompted recollection is least distorted, but completeness requires extensive questioning, which is inevitably suggestive and distorting. To the extent that this conflict exists, concern with accuracy will result in less witness preparation, and concern with completeness will result in more witness preparation. The adversary system effectively drives the choice

Berg, supra note 2, at 13 (noting that witness preparation takes place "in the privacy of our offices"); Frampton, supra note 12, at 33 (describing custom of one-on-one preparation between government witness and prosecutor, with no written records kept).

324. The intuitive view that an unprepared side would be at a disadvantage is supported by a study showing that when one side prepared and presented its case in a client-centered (partisan or adversarial) manner and the other side in a court-centered (outcome-neutral) manner, the client-centered side prevailed. See Lind, Thibaut & Walker, supra note 270, at 1142. However, there was little difference between the two types of approaches with respect to diligence of preparation, except that client-centered lawyers who appeared to be losing sought additional facts. See id. at 1140-41.

325. For a discussion of a lawyer's responsibility to adequately prepare for the client, see MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1989); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1981). As discussed in Part II, the legal carrot to encourage adequate preparation is the secrecy surrounding witness preparation, and the stick is the requirement of zealous and competent representation.

326. See Loftus & Zanni, supra note 297, at 86; supra text accompanying notes 271-306.
toward completeness. Doctrinally, thorough preparation is an affirmative ethical obligation, while inaccurate testimony is often untestable and punishable only if knowingly induced. Structurally, the partisan advocate's role is not to present a balanced picture of the case but to develop the facts to persuade a neutral and naive tribunal.

Under these circumstances it is unrealistic to think that witness preparation could consist merely of eliciting the witness's narrative or that it could resemble the direct examination of a witness at trial. Recognition is greater than recall. When asked to remember something they have observed, people respond with far less detail and certainty than when asked to confirm or deny an observation. In addition, memory functions best when a person relives the event. If narratives or bland general inquiries are unlikely to distort, they are also unlikely to stir recognition or to focus a witness's attention upon the specific event. A lawyer who wants to discover all that can reasonably be learned about the case cannot take the chance that important facts will be missed in a general interrogation. The lawyer familiar with the case is in an ideal position to explore the witness's knowledge by providing the materials that will help stimulate a more complete recollection of a transaction.

Having learned enough about the case to advise the client, the lawyer must fulfill a second duty—presenting the client's case persuasively. Counsel in the adversary system must educate and persuade the naive tribunal in a compressed period of time. At a minimum the lawyer is "entitled to help place the witness' testimony in a light

327. See F. Bartlett, supra note 280, at 195; Cofer, supra note 285, at 218-19; Loftus & Zanni, supra note 297, at 86.
328. See Koestler, supra note 285, at 263-64 (describing the process by which a fragmentary image can have "uncanny evocative power"). See generally F. Bartlett, supra note 280, at 207 ("When a subject is being asked to remember, very often the first thing that emerges is something of the nature of attitude. The recall is then a construction, made largely on the basis of this attitude."); A. Trankell, supra note 93, at 24 (providing a summary of memory processes).
329. See A. Trankell, supra note 93, at 22. An interesting example of neutral use of leading questions is Pediatric Telephone Advice, a handbook for pediatricians' offices for handling telephone calls from concerned parents. See B. Schmitt, Pediatric Telephone Advice 25-270 (1980). Clearly, the user's central concern is to obtain information that is as accurate as possible. One can hardly find a direct question in the book. For example, in the case of a coma, the parent is asked these clearly leading questions:
1. Is there any possibility of a head injury or neck injury? . . .
2. Is there any chance of poisoning or a drug overdose? . . .
3. Is there any chance your child was just stung by a bee or wasp? . . .
4. Is your child's breathing very slow and weak? Are your child's lips or skin bluish or dusky?
Id. at 32.
330. See supra note 254. Presentation of the case generally occurs after the initial investigation, but the two processes may overlap. Settlement discussions with the opponent, for example, may take place during discovery.
favorable to the client” and to make the testimony at trial clear and persuasive, regardless of the natural articulateness of the witnesses. To present an effective case, the person responsible for obtaining and presenting the facts to the tribunal must organize them in a convincing way. The decision whether certain witnesses will testify depends on the lawyer’s evaluation of each witness’s credibility and persuasiveness during witness preparation.

Similarly, the orderly development and presentation of the case through the testimony of several witnesses and within the testimony of a particular witness are important both for simple coherence and for persuasive effect. “[O]rdering . . . the prospective proofs, organizing, aligning, and marshaling empirical data with the view to combative employment . . . is the hallmark of the adversary enterprise.” Certain types of presentation—for example, a chronological narrative—are particularly effective in aiding comprehension; others—for example, building to a climax—are particularly suited for persuasion. Obviously, a presentation structured on the basis of these principles is anything but natural or spontaneous, but an attorney would be remiss in not presenting the evidence in a manner that is comprehensible and compelling to the tribunal.

In sum, neither completeness nor persuasion can be achieved by a passive advocate. Lawyers must choose the context in which to present witnesses’ testimony, and they must also teach the witnesses how to present their testimony most effectively. Remaining well within existing ethical boundaries, the lawyer can suggest to a witness which points to emphasize, which to avoid unless directly asked (“don’t volunteer” is the

331. G. Bellow & B. Moulton, supra note 13, at 357.
332. See M. Freedman, supra note 14, at 62.
333. See J. Sonsteng, supra note 95, at 211-12.
334. See, e.g., R. Aron & J. Rosner, supra note 2, at 151-52 (emphasizing the importance of order in presenting witnesses); D. Shulman, supra note 268, at 1201-13 (advising lawyers to place a strong witness on the stand first and to present the client as a witness as late as possible in the case); Hanley, supra note 93, at 477-78 (arguing that success depends on preparation and presentation of witnesses and on order of presentation).
335. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 616 (S.D.N.Y. 1977); see also Hickman v. Taylor, 329 U.S. 495, 511 (1947) (asserting that proper presentation of a client’s case demands that the attorney assemble information and sift through the facts to prepare legal theories without undue and needless interference). A less edifying—but no less legitimate—goal is to “bury the adverse witness in the middle of [the] case.” Hanley, supra note 93, at 480.
336. See J. Sonsteng, supra note 95, at 27 (describing a trial as a play directed by the attorney “using actors and actresses as witnesses who perform for an audience composed of the jury and judge”); McElhaney, supra note 13, at 83 (advising a lawyer who is “planning to save some powerful piece of evidence” for the end of the testimony to tell the witness not to “blurt out the climax at the very beginning”).
337. See supra text accompanying notes 95-109.
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watchword of much preparation), and how best to describe or characterize events or actions. Levin and Cramer explain:

[One might assume] that the witness has command of the substance of his testimony and the vocabulary with which to express it. The assumption is, of course, totally unwarranted. Witnesses, without any intention of falsifying, exaggerate speed, lengthen or fore-shorten time, and otherwise "shade the details" of a case to an extent which must inevitably hurt their own cause. Other witnesses, far from dealing in hyperbole, are so lacking in imagery and verbal skills that they can hardly describe an event. Unaided, they may fail totally to communicate the significance of their experience.

These very facts, as we have seen, impose upon the attorney the obligation to aid the witness.338 It is, therefore, impossible to avoid detailed discussion of the substance of prospective witnesses' testimony if each side is to present a coherent and persuasive case.

D. Conclusion

Witness preparation presents lawyers with difficult ethical problems because it straddles the deeper tension within the adversary system between truth seeking and partisan representation. Witness preparation may foster inaccuracy by introducing distortion into a witness's testimony, but it also promotes accuracy when it is used to clarify complex or ill-recalled events. Witness preparation is a child of the adversary system—an inevitable outgrowth of its structure339—and like its parent embraces both truth seeking and partisan representation.

IV. Toward a Resolution of the Witness-Preparation Problem

The witness-preparation problem, as discussed in this Article, has two parts. First, the applicable legal doctrine is complex and ambivalent. Second, the doctrinal complexity and ambivalence reflects a tension within the fundamental structure of the adversary system. It is important to recognize that the arguments in Part III for and against witness preparation do not exactly answer each other. Most critics of witness preparation point to its distorting effects on testimonial accuracy. Its supporters reject the primacy of accuracy or point to the value of witness preparation in creating a clear and persuasive adversarial presentation.

The critics emphasize outcome, while the supporters emphasize process and structure. At first glance, it seems that these very different perspectives make a general approach to resolving witness-preparation questions impossible. In fact, the opposite may be true.

Professor Luban has suggested that the adversary system has a wide and a narrow sense. In the wide sense, partisanship has its own value. Taken to its logical conclusion, the adversary system in the wide sense can be used to justify what Luban calls ruthless behavior—that is, aggressive partisanship bordering on the unethical or illegal. In the narrow sense, the adversary system is simply a structure and resulting procedures. The narrow sense creates no imperative to follow the adversarial nature of the system to its logical conclusion—that truth seeking is essentially irrelevant. Rather, the adversary system’s structure necessitates some departures from truth seeking and other judicial goals, but within that structure exists the flexibility to pursue those goals.

The distinction between the adversary system as ideology and as structure provides the framework for an approach to the witness-preparation problem. Witness preparation is justified when the narrow version of the adversary system necessitates it. Witness preparation’s distorting effects on testimony are not justified when witness preparation is merely a reflection of partisanship and competitiveness for their own sakes. For example, because the structure of the adversary system requires partisan presentation of a case, some preparatory activities are essential to a coherent and persuasive presentation. Thus, a rigid rule banning all pre-trial contacts with witnesses would reduce distortion but would be incompatible with the adversary structure that demands that the parties develop the facts. The goal in evaluating a particular witness-preparation technique used with a particular type of witness must involve an assessment of the adversarial implications. Witness preparation should be channeled into those methods that permit partisan case development but present the least threat of impaired fact finding.

Two kinds of rules, ethical and procedural, affect witness preparation practices. A lawyer has an ethical duty, based on the structure of the adversary system, to understand a client’s case as fully as possible and to present it as persuasively as possible. Because virtually all witness preparation has distorting effects on testimony, preparation should be

340. See Luban, supra note 47, at 90-91. Professor Luban, however, would probably go on to say that the adversary system, even in its narrow sense, is not justified just because it is there. Its mere existence does not necessarily demonstrate the morality of the adversary system or of witness preparation. See id. at 111-18.

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limited to the minimum necessary to fulfill the lawyer's ethical responsibility. The lawyer must be able to obtain information, clarify important points, expose or resolve misperceptions, and organize the presentation of the case. Beyond that, polishing, scripting, and rehearsing (especially repeated rehearsing) seem undesirable. A witness should be calm and in command of the subject matter of the expected testimony, but invulnerability is neither a realistic expectation nor in most cases an accurate reflection of the witness's knowledge.

The lawyer's negative ethical duty—not knowingly to mislead the tribunal—is less easy to apply to witness preparation practices. None of the practices identified in Part II necessarily result in false testimony, and all can be justified as enhancing accuracy in some or most cases. Therefore, the ethical prohibition must turn on the question whether the lawyer knows of the falsity of the resulting testimony. Because such knowledge is difficult to quantify and to prove, the prohibition on knowingly presenting false testimony is not likely to be a helpful guide to appropriate witness preparation, as the reaction to Opinion No. 79 demonstrates. Moreover, knowingly presenting false testimony ought to be extreme conduct that witness preparation should ordinarily not approach. The ethical lawyer should not feel free to engage in any witness preparation activity short of actually countenancing perjury.

Procedural rules hold out more promise for balancing the lawyer's responsibilities. Procedural rules can be designed to turn on more objective criteria than a lawyer's state of mind or the potential effects of subtle suggestion. Consequently, procedural rules are more easily understood and enforced. Three witness-preparation situations previously discussed in this Article will serve to demonstrate this approach: (1) Colonel North's use of notebooks containing selected non-privileged documents while preparing for testimony, (2) the discovery of material supplied to expert witnesses in *Berkey*, and (3) the group preparation of prosecution witnesses in *United States v. Ebens*.

A. Collections of Non-Privileged Documents

One can speculate that Colonel North's notebooks contained, among other things, some of the documents provided by or available to the congressional investigators. North's lawyers probably selected and organized those documents according to their view of the documents' significance for North's defense. North undoubtedly reviewed and dis-

342. See supra text accompanying notes 120-125.
343. See supra text accompanying note 8.
344. 800 F.2d 1422 (6th Cir. 1986).
cussed the documents extensively with counsel before appearing before the committees. The selection and use of the documents in preparation for testimony, therefore, constitutes the most sensitive kind of legal work. The resulting collection represented core work product and reflected attorney-client communications.

A sweeping waiver by rule 612 of the protection afforded to this collection of documents should be inferred only with great caution. As Professor Marcus and others have pointed out, since this preparation technique clearly does not constitute voluntary exposure or voluntary risk of exposure, the idea of waiver is itself inapt. Rather, applying rule 612 to require disclosure simply elevates rule 612 above the rules providing privacy for witness preparation, a result that seems to have little support in the text or legislative history of rule 612. Doctrinally, the issue is a stand-off.

A look at the adversarial process presents a clearer choice. Review of relevant documents has distinct advantages for the quality of a witness’s testimony. It is precisely the kind of preparation that should be encouraged. It enormously enhances the completeness, accuracy, and coherence of the testimony, as North and Sullivan said repeatedly. Moreover, use of the pertinent documents themselves affords little opportunity for distortion, because their contents cannot change to the degree that unsupported memory can; partisan flights of fancy are firmly tethered by the documents themselves. Moreover, distortion is largely remediable by the diligent efforts of opposing counsel, who has access to the underlying documents, as Sporck recognized.

The greatest problem with permitting discovery of these compilations is not that counsel will forego review of important documents with witnesses—some familiarity with the relevant documents will always be essential—but rather that a different technique for review will be employed. The cautious lawyer, in light of the Berkey decision requiring disclosure in most situations, should assume that all preparation material will be revealed. Because rules 23(b)(3) and 612 apply only to written materials and because the courts have strictly protected from disclosure preparation activities that constitute oral work product, the obvious

345. The present discussion focuses on preparatory use of a presumed collection of discoverable documents. Other materials in the notebooks—for example, North’s own notes—are treated only in passing. Similarly, North’s consulting the materials during testimony makes the case for disclosure far more compelling.
346. See supra text accompanying notes 188-194.
347. See supra text accompanying notes 196-215.
348. See Iran-Contra Hearings, supra note 1, at 237-41.
350. See supra notes 62-64, 196-234 and accompanying text.
alternative is to prepare witnesses by describing but not showing the relevant documents to them.351 Indeed, some courts, in requiring disclosure of materials reviewed during preparation, have suggested that the "sophisticated prospective witness [would] . . . use a 'coach' who has examined the documents, rather than the documents themselves."352

Oral description of documents is the worst possible type of witness preparation for the legal system to encourage. First, preparation that is done orally does not reduce the risk of distorting memory.353 Quite the contrary, there is a great likelihood that any oral description of a document would be, to some degree, inaccurate. The lawyer would undoubtedly introduce biases, for example, by minimizing the significance of a document because the lawyer wishes it minimized. Without the document in hand, the witness has little choice but to agree with that characterization. Consequently, any further interpretation of the document by the witness will likely stray far from the truth. Unnecessary inaccuracy of this kind provides little support to the witness—who may be brought up short on cross-examination—and constitutes a disservice to the tribunal.

Second, oral preparation is likely to be incomplete preparation. Relying on only oral discussion, the witness may be surprised during testimony by a particular turn of a phrase, by the context or placement of a point in the document, or by material that was simply not discussed. Careful review of the actual document by the witness would frequently correct this problem. It would also enable the witness to assist the lawyer by noticing points about the document that the lawyer may have missed. In all likelihood, the witness will be more familiar with the circumstances under which the document was written. Education of the lawyer is, after all, an important part of witness preparation, and it makes no sense to deprive the lawyer of this source of information.

Finally, penalizing written preparation tends to favor those parties with the resources to spend the extra time to meet face-to-face with witnesses or the extra resources to create special, "sanitized" collections of documents for review by witnesses.354 Litigation favors the wealthy liti-

353. See Marcus, supra note 57, at 1646-47 (noting that "the intensity of face-to-face preparation may foster shading of testimony").
354. See id. at 1613-14, 1644.
gant enough as it is,\textsuperscript{355} without conferring this additional advantage. There is an alternative to both wholesale disclosure and complete secrecy. Just as Professor Marcus recommended borrowing the "particularized need" standard from Federal Rule of Criminal Procedure 6(e) (relating to the secrecy of grand jury material) for disclosure of privileged documents,\textsuperscript{356} rule 6(e) can also be borrowed for collections of non-privileged documents. A line of cases in the District of Columbia Circuit has addressed the problem of applying rule 6(e) to collections of otherwise discoverable documents. The court took as axiomatic that submission of documents to a grand jury does not immunize them from all future discovery. The issue is what future discovery may occur without disclosing matters occurring before the grand jury. The court has arrived at an elegant, predictive, and highly practical rule: only the production of grand jury documents \textit{as such} is prohibited; the documents themselves remain independently discoverable.

In the first of the cases, a Securities and Exchange Commission subpoena for documents that had previously been presented to a grand jury was upheld because the agency had valid, independent grounds for requesting the documents—there was no reason for the Commission even to know of the grand jury's existence.\textsuperscript{357} Conversely, a Freedom of Information Act request for Watergate documents was denied in another case because the request specifically sought information presented to a grand jury.\textsuperscript{358} In \textit{Senate of Puerto Rico v. Department of Justice},\textsuperscript{359} the court upheld a Freedom Of Information Act request that asked for all documents on a certain subject in Department of Justice files, including \textit{but not limited to} materials presented to a grand jury.\textsuperscript{360} The court reasoned that the Department could have released all the documents requested without further identifying their source, and the requester would have been unable "to determine \textit{which} documents had been submitted to the grand jury."\textsuperscript{361}

\textit{Senate of Puerto Rico} has direct application to witness preparation

\textsuperscript{355}. \textit{See id.} at 1613.
\textsuperscript{356}. \textit{See id.} at 1647; \textit{supra} section II(B)(5).
\textsuperscript{357}. \textit{See SEC v. Dresser Indus.}, 628 F.2d 1368, 1382-83 (D.C. Cir.) (en banc), \textit{cert. denied}, 449 U.S. 993 (1980); \textit{see also} United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978), \textit{cert. denied}, 440 U.S. 983 (1979) (allowing disclosures that revealed nothing about a grand jury investigation to persons with a legitimate interest in the documents); United States v. Interstate Dress Carriers, 280 F.2d 52, 54 (2d Cir. 1960) (allowing disclosure of data sought "for its intrinsic value in the furtherance of a lawful investigation . . . rather than to learn what took place before the grand jury").
\textsuperscript{358}. \textit{See Fund for Constitutional Gov't v. National Archives \\& Record Serv.}, 656 F.2d 856, 869-70 (D.C. Cir. 1981).
\textsuperscript{359}. 823 F.2d 574 (D.C. Cir. 1987).
\textsuperscript{360}. \textit{See id.} at 582-83, 589.
\textsuperscript{361}. \textit{Id.} at 583.
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involving the use of a collection of discoverable documents. It makes sense to protect the privacy of the collection in a way that retains access to the underlying documents. It is one thing to ask a witness what happened at a particular board meeting; it is quite another to ask what the witness and counsel discussed about the meeting. The opposing party can have full access to the underlying information through substantive discovery, but the burden remains on the questioner to select topics and documents to ask about. The request for the collection itself, in contrast, is like the request for grand jury materials per se—it treads in a protected area and serves only to reveal protected information.

This arrangement affords a significant degree of privacy to the preparer. Even if the questioner is permitted to ask whether the witness reviewed a particular document prior to testifying, answers to that question would not necessarily reveal whether the document was presented to the witness by counsel. Moreover, if preparation was at all extensive, the witness is unlikely to remember completely or accurately which documents were discussed with counsel. The main purpose for asking for an “official list” of documents reviewed with a witness is to obtain a complete and accurate picture of the matters deemed significant by the witness’s preparer. The questioner hopes in this way to infer the opponent’s evaluation of the significant points in the case and perhaps the opponent’s lines of proof and argument. Unless the picture obtained is certain and complete, it is not much more useful than the questioner’s own evaluation of the case. Therefore, identifying the documents relied upon piecemeal through the witness’s recollection is highly unsatisfactory to the opponent; in addition, it preserves the secrecy of the preparer’s strategy.

Protecting the privacy of witness preparation obviously encourages preparation and advances the partisan aspects of the adversary system. Access to the underlying documents serves the accuracy goals of the system. An opposing lawyer who identifies the important issues in the case can use specific questions to discover what the witness has consulted. In the context of grand jury materials, the individual documents’ availability from other sources is decisive: “The civil lawyer’s need [for grand jury materials] is ordinarily nothing more than a matter of saving time and expense. . . . We have consistently rejected the argument that such

362. Similarly, the attorney-client privilege permits the first question, which requests underlying facts, but not the second, which requests the communication between client and attorney. See Upjohn Co. v. United States, 449 U.S. 383, 395 (1981).

363. Cf. Vogel, supra note 101, at 397 (asserting that a witness will recall, if asked, “that questions were asked rather than statements made”).
savings can justify a breach of grand jury secrecy.\textsuperscript{364} Similarly, as long as the opposing lawyer has the ability to obtain individual documents and cross-examine the witness about them, there is no compelling need to breach the work-product protection.

\textbf{B. Expert Witnesses}

The competing goals of the adversary system dictate a different result for an expert who will testify at trial.\textsuperscript{365} The preparation activity at issue in \textit{Berkey} was providing background information to expert witnesses.\textsuperscript{366} \textit{Berkey} involves written information, but the analysis that follows applies equally to oral communications.

For unexplained reasons, the \textit{Berkey} court did not even consider the discovery rules that apply to experts. Instead, it relied on Federal Rule of Evidence 612, which applies to witnesses generally.\textsuperscript{367} The equities of the case demanded disclosure, but the liberal use of Federal Rule of Evidence 705 and Federal Rule of Civil Procedure 26(b)(4), which apply directly to experts, would have allowed this disclosure.

Preparation of expert witnesses should be treated differently from preparation of other witnesses. Subtle distortion of the testimony by pre-trial coaching is to a large extent a nonissue: the expert is and can be easily depicted on cross as an advocate.\textsuperscript{368} In the expert-witness context, the structural needs of the adversary system are more important. Substantive cross-examination requires access to the facts and data that form the basis for the expert's opinion. Because the expert, like the tribunal, is naive and must be "programmed" with the facts of the individual case, the expert's conclusions are only valid, or even meaningful, in the context of the input.\textsuperscript{369} It is hardly unreasonable, therefore, to require that the

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  \item \textsuperscript{364} United States v. Sells Eng'g, Inc., 463 U.S. 418, 431 (1983).
  \item \textsuperscript{365} As this Article has pointed out, see \textit{supra} notes 85, 89, experts may have a variety of roles in litigation. Some differences are legally significant, and some are not. See \textit{id}. \textit{Berkey} represents one of the most common (and straightforward) uses of experts, but it does not represent all such uses. Accordingly, experts with more complex relationships to the sponsoring party—for example, in-house experts—may have to be treated differently.
  \item \textsuperscript{366} Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977) (Frankel, J.).
  \item \textsuperscript{367} See \textit{id}. at 616-17. Given his general views on witness preparation, Judge Frankel was probably anxious to reach for the more general proposition that would open up witness preparation to greater scrutiny. The subsequent retreat from the \textit{Berkey} position, see \textit{supra} section II(B)(6), suggests the value of confining \textit{Berkey}'s broad holding to the expert setting.
  \item \textsuperscript{368} This perception of the expert as an advocate is presumably the reason that the Third Circuit found that discovery of core work product would not affect the expert's credibility. See Bogosian v. Gulf Oil Corp., 738 F.2d 587, 595 (3d Cir. 1984) (holding that the "marginal value" of disclosure of attorney-expert communications allowed disclosure). Because it is generally recognized that the lawyer explains to the expert more or less exactly what needs to be said, the communications reflecting this explanation have no bearing on the plausibility of the expert's opinion.
  \item \textsuperscript{369} The requirement for hypothetical questions to experts—which was in place before enactment of the Federal Rules of Evidence—was a reflection of this philosophy. The jury was able in
\end{itemize}

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expert, like the tribunal, render opinions on a definite record. The more we accept the idea that scientific conclusions are not inevitable, the more important it is to know precisely how experts reach their conclusions—only then can opponents effectively challenge them. Moreover, the expert’s very lack of personal knowledge makes it relatively easy to reconstruct, to an extent impossible with a lay witness, the universe of case-specific facts upon which the expert is relying.

Even though the Federal Rules of Evidence require only disclosure of factual material provided to the expert during cross-examination, many courts require early disclosure to permit a thorough, orderly, and efficient examination. This disclosure typically begins with interrogatories and document requests. Based on the interrogatory answers and documents, the opposing lawyer then deposes the expert, also exploring any foundational material that has been communicated orally. Disclosure under these terms poses no threat to the partisan nature of the adversary system. The essential work product—strategy and lines of proof—is already revealed in interrogatories covering the expert’s identity, the subject of the proposed testimony, and the opinions that will be rendered. The rest involves factual foundation, disclosure of which is essential to effective cross-examination. Whatever its faults, cross-examination is the main tool for achieving the accuracy goals of the advocacy system. Accordingly, there is no sound reason to protect factual information provided to testifying experts from early and complete disclosure.

C. Group Preparation of Witnesses

The final application involves the hardest issue, collusive witness preparation. In United States v. Ebens, the government prosecuted Ronald Ebens and Michael Nitz for violating the civil rights of Vincent Chin, theory to see each and every factual assumption upon which the expert based the conclusion and then compare the assumptions to its findings of the actual facts of the case. See supra section II(B)(4).

370. See Gay v. P.K. Lindsay Co., 666 F.2d 710, 713 (1st Cir. 1981), cert. denied, 456 U.S. 975 (1982) (rejecting application of both rules 612 and 705 because no reliance by the expert had been demonstrated).


372. See Shulman, supra note 284, at 521-22.

a Chicago man who had been brutally murdered allegedly because of his Chinese ancestry. For their roles in the murder, Ebens and Nitz had received what many perceived to be unreasonably light sentences in state court. The civil rights prosecution followed the resulting public outcry. One of the most active proponents of federal action was lawyer Lisa Chan.

Chan was neither a prosecutor nor was she formally connected with the litigation. Nevertheless, she met with three of the main prosecution witnesses—Robert Sirosky, Gary Koivu, and Jimmy Choi—friends of Chin who had been with him at various times on the night of the murder. She explained to the witnesses that they were meeting "to help each other remember exactly what happened, how it happened, when it happened and all the minor details."\(^{374}\) Chan also sought to reconcile the versions of Sirosky, Koivu, and Choi with the statements of other witnesses.

The issues discussed were, among other things, whether the defendants had directed ethnic slurs at Chin.\(^{375}\) Koivu and Sirosky recalled having heard Ebens and Nitz use racially inflammatory language, but Choi initially did not. The meeting was tape recorded, and the defendants sought to introduce the transcript of the meeting to impeach the witnesses by showing that they had been coached. The court of appeals held that the trial court's refusal to permit the defendants to use the transcript was reversible error.

*Ebens* is an unusual case because, apart from involving particularly unsubtle group preparation, (1) the preparation session was conducted by a lawyer who, representing none of the parties, had no claim of privilege, and (2) a tape recording of the session was extant. To make the example more representative of actual practice, let us suppose that *Ebens* had been a civil action in which (1) Chan represented all three witnesses, and (2) the session was not recorded. If Choi testified truthfully at trial that he heard ethnic slurs, the statements made at the meeting with Chan, while of great importance to the defense, would have been absolutely protected by the attorney-client and work-product privileges.\(^{376}\) Within the adversary structure, Chan was well within her rights to inform her

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374. United States v. Ebens, 800 F.2d 1422, 1431 n.2 (6th Cir. 1986). The court reprinted substantial portions of the transcript of Chan's meeting with the witnesses as an appendix to its opinion. *Id.* at 1442-45.

375. This fact is highly significant, because the prosecution had to be able to prove that the defendants were motivated by ethnic or racial animus. *See id.* at 1429.

376. The transcript in *Ebens*, whatever its impeachment value to the defendants, does not demonstrate that either Chan or the witnesses intended to present false testimony to the court. Accordingly, the crime-fraud exception to the attorney-client privilege would not have provided grounds for disclosure of the substance of the meeting, had the attorney-client privilege applied in the first place. *See* United States v. Gordon-Nikkar, 518 F.2d 972, 974-75 (5th Cir. 1975).
clients of the expected testimony of others and to encourage them to reflect on the accuracy and certainty of their memories.

But group preparation poses extraordinary dangers of collusion, influence, and fabrication. Accordingly, the defendants should have been permitted to ask each witness whether he discussed the substance of his testimony in the presence of other witnesses, when the discussions occurred, which subjects were discussed, and who was present, regardless of the presence of counsel at such meetings. The substance of the conversations with counsel would have remained privileged, but the courts' usual reluctance to permit questioning on the subject matter of discussions between lawyers and clients would give way.

This outcome is a compromise. Truth seeking is thwarted because the defendants do not learn of Choi's initial failure to recall ethnic slurs. Partisan representation is thwarted because the secrecy of Chan's preparation is breached—the mere occurrence of such meetings will be damaging to Choi's credibility in the eyes of the jury. On the other hand, the defendants obtain a limited impeachment tool, and Chan has the opportunity to resurrect Choi's memory on an important point. In a single case, this resolution may be no more than an expedient compromise of conflicting interests. In the long run, however, required disclosure of group meetings of witnesses would be a strong disincentive to such behavior. Like oral description of documents and secret data provided to experts, group preparation does not represent an equilibrium between partisanship and accuracy, but instead the triumph of partisanship. Any resolution of the witness-preparation problem must restore that balance.

377. Concededly, a well-executed hub-and-spoke arrangement in which the lawyer coordinated testimony through meetings with one client at a time could have similar deleterious effects. See United States v. Townsley, 843 F.2d 1070, 1086 (8th Cir. 1988) (citing Diversified Indus. v. Meredith, 572 F.2d 596 (8th Cir. 1978)). Hub-and-spoke consultations should be excluded from this disclosure rule, however, on practical grounds. First, such arrangements are very time-consuming, especially if many issues and perspectives are involved. Second, the lack of direct conversation among the witnesses is likely to lead to adoption of an ill-fitting story that will be more vulnerable to cross-examination, if not impeachment. Third, it is unwise to start down the road of required disclosure of one-on-one meetings between lawyers and clients, because it would intrude into entirely legitimate conferences. Group preparation provides a relatively clear, albeit imperfect, line of demarcation.


379. See Vogel, supra note 101, at 398 (recommending that "if it should appear that all of the witnesses have met at a single time with counsel, the impression is left that they all got together and arranged a story").
V. Conclusion

This Article has identified the place witness preparation occupies in the American judicial system and the difficulties it poses for the administration of justice. As a practical matter, witness preparation is a universal practice, despite the pervasive uncertainty in the legal rules that apply to it. The uncertainty is the result of the ambivalent doctrinal basis for witness preparation: the adversary system encourages the practice but simultaneously seeks to remedy its effects. The ambivalence, in turn, can be traced to the adversary system’s competing goals of accuracy and partisan representation.

Witness preparation is not harmless. It provides opportunities for lawyers to encourage witnesses to adopt convenient, if not necessarily accurate, testimony. Even with the most honorable intentions, preparation may result in the distortion of witnesses’ recollections. But witness preparation is integral to the lawyer’s role in a judicial system that depends on partisan case development. Some preparatory activities are essential to a coherent and reasonably accurate factual presentation. More intensive preparation is required if the partisan advocate is to fulfill the ultimate responsibility to the client—presenting a persuasive case. This conflict cannot be resolved with one or a few doctrinal rules. Instead, each case requires thoughtful consideration of the precise nature of the witness preparation involved and of its relationship to adversarial justice.