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"Positively 4th Street"[1]: Lawyers and the "Scripting" of Witnesses

By C. Evan Stewart

George W. Bush once famously said: "Fool me once,...shame on...shame on you. Fool me—you can't get fooled again."[2] Well, if a very prominent attorney is correct, shame on me, and I did get fooled again. I have always thought it was unethical to give a witness a written script with "answers" on it; and I have always thought that such a document, once given to a witness, was a document to which my adversary was fairly entitled. Am I wrong on both counts?

Back to the Future

Recently, I wrote about the wide divergences in witness preparation practices between American lawyers and our English "cousins."[3] But I had thought our practices in America had been pretty well settled for quite some time. Let's start first with the waiver issue, because that is close to my heart.

I had been a lawyer less than three months when I was summoned to an all-firm meeting at the top of 30 Rockefeller Plaza. There, for the first time, I saw Sam Murphy, Donovan Leisure Newton & Irvine's most famous litigator,[4] explain to a stunned group of lawyers (i) that a senior partner at the firm had lied about destroying documents sent to (and reviewed by) a client's expert witness, and (ii) what the possible effects this inexplicable act might/would have on the client (then concluding the country's most significant antitrust trial, *Berkey Photo v. Eastman Kodak*) and the firm.[5] The inexplicable act had come on the heels of the trial judge putting counsel on notice that any materials shown to testifying experts would have to be produced to the other side pursuant to Federal Rules of Evidence 612 ("Writing Used to Refresh a Witness's Memory").[6]

Rule 612 reads, in whole, as follows:

> (a) **Scope.** This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
>
> (1) while testifying; or
>
> (2) *before testifying, if the court decides that justice requires the party to have those options.*
>
> (b) **Adverse Party's Options; Deleting Unrelated Matter.** Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.
>
> (c) **Failure to Produce or Deliver the Writing.** If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or—if justice so requires—declare a mistrial.[7]

Thus, the key provision at issue here is (a)(2) ("before testifying"), which gives the court discretion to order production when "justice requires" it.

In the wake of the *Berkey Photo* decision[8] and the searing impact of what happened during that litigation and trial,[9] many, many courts have reflexively ruled that any written materials used to refresh a witness's memory (including work product) are fair game under Rule 612.[10] A number of other courts—influenced both by the concerns of the U.S. Supreme Court's ruling in *Hickman v. Taylor* vis-à-vis the attorney-work product doctrine,[11] as well as by Judge Jack Weinstein's learned treatises on evidence[12]—have ruled that the court's discretion should take into account several factors, including (i) the extent to which the witness was influenced by and/or actually relied on documents to refresh his or her recollection, and (ii) the extent to which privileged or "core" work product material would be revealed as a result of disclosure.[13]

The leading case applying this "balancing" test—and *not* ordering disclosure—is *Sporck v. Peil*, decided by the Third Circuit in 1985.[14] That case involved several hundred thousand documents, a select number of which counsel picked out, compiled, and presented to a witness prior to a deposition. When this preparatory process was revealed at the deposition, opposing counsel moved for the documents' production. The trial court granted that motion. The Third Circuit reversed, however, and did so principally on two grounds: (i) the attorney's selection of the materials reflected his core work product; and (ii) there was no evidence that the witness relied on the documents or that they had influenced his testimony.

Whether or not a subset of already produced materials shown to a witness before testimony should or should not be subject to production,[15] that type of witness preparation is light years from a "script" of questions *and answers* counsel has prepared and shown to a witness in advance of testimony. Such a "script" would surely be a significant crutch on which a witness would be heavily relying, and it also would clearly constitute the sort of coaching that has caused courts employing the "balancing" test to order production.[16]

Furthermore, even Judge Weinstein (who is a major proponent of the "balancing" approach) urges that my prominent colleague at the bar desist:

> In the present state of uncertainty [i.e., the policy conflict between *Hickman v. Taylor* and Rule 612], attorneys should **not** refresh prospective deponents or witnesses with material containing counsel's theories or thought processes. Not only may such documents ultimately fall into opposing counsel's hands if Rule 612 is satisfied, but there are too many risks of unethical suggestions to witnesses when they see such material.[17]

Is It Ethical?

So if such a "script" is going to fall into the hands of opposing counsel 99.99 out of 100 times, left is the question of whether the practice of "scripting" is ethical.

First, the good news: assuming that the "answers" are not suggesting (or more) that the witnesses present false testimony, such a "script" will likely skate past suborning perjury.[18] Now, the bad news: there is a New York Court of Appeals decision directly on point. In *In re Eldridge*, a lawyer was suspended for writing out answers for witnesses; the court declared that a lawyer's duty is "to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[19]

While *Eldridge* is from the Gilded Age, it would appear to still be good law,[20] although most *reported* decisions of disciplinary cases of late involve subornation of perjury or similar lawyer misconduct seeking to promote false testimony.[21] That said, a plaintiffs' law firm in heated asbestos litigation in the 1990s was "excoriated" by one trial judge for conduct that included scripting witnesses.[22] There, the law firm used a document to prepare clients for depositions in personal injury suits against asbestos manufacturers, and the document included these directives:

- "It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it."
- "It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER."
- "DO NOT say you saw more of one brand than another, or that one brand was more commonly used than another.... Be CONFIDENT that you saw just as much of one brand as all the others."
- "Unless your...attorney tells you otherwise, testify ONLY about INSTALLATION of new asbestos material, NOT tear-out of the OLD stuff."
- "If there is a MISTAKE on your Work History Sheets, explain that the "girl from [the law firm]" must have misunderstood what you told her when she wrote it down."

The foregoing—excerpts from the 20-page document—would appear to be skating up to (or over) the line of "counsel[ing] or assist[ing] a witness to testify falsely" (a violation of Rule 3.4(b)). Nonetheless, and for all the hubbub about sanctions and a possible criminal referral, the law firm got very lucky and ultimately escaped without any official penalty.[23] Even so, the publicity about what had happened brought enormous scrutiny down upon the law firm, caused it to take a huge reputational hit, and earned it general scorn from legal academic ethics experts.[24]

So the take-away on "scripting" is what? Maybe if I do it I won't get caught? But even if I do, maybe I will get lucky (like the asbestos lawyers) and not be sanctioned? That is not the professional advice I would be giving to those who want to lead a long, happy, and prosperous career at the bar. But, à chacun son goût.

Conclusion

A number of years ago, my law school dean wrote of the legal profession's "terribly insecure" world, in which lawyers "are caught in a rat race that makes money and status the only shared goals."[25] One area which he specifically identified as a place to stem the tide and make lawyers "more accountable for their conduct" was to "police the extent to which witness coaching has the effect of creating a coordinated or fabricated story."[26] That does not seem to be too much to ask.

Endnotes

1. Bob Dylan's classic song was recorded on July 29, 1965, and released by Columbia Records on September 7, 1965 (a single only, it reached #7 on the U.S. Billboard Hot 100). The invocation of this song was "inspired" by the attorney referenced herein.
2. President George W. Bush, Nashville, Tenn. (Sept. 17, 2002). Of course, he also once posed the rhetorical question: "Rarely is the question asked: is our children learning?" Florence, S.C. (Jan. 11, 2000). Dubya's quote in the text should not be confused with The Who's most famous lyric: "Meet the new boss, same as the old boss.... We won't get fooled again." "Won't Get Fooled Again" (Who's Next, MCA 1971).

3. *See* C.E. Stewart, *Mad Dogs and Englishmen*, NY Bus. L. J. (Summer 2013).

4. *See* C.E. Stewart, *Jumping on a Hand Grenade for a Client*, Fed. Bar Council Quarterly (November 2009).

5. *See* J. Stewart, The Partners (Simon & Schuster 1983); S. Brill, *When a Lawyer Lies*, Esquire (Dec. 19, 1979); S.M. Edwards, *There But For Fortune...*, Federal Bar Council News (Feb. 2005).

6. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977).

7. Fed. R. Evid. 612 (emphasis added). Rule 612 was adopted January 2, 1975 (effective July 1, 1975) and amended December 1, 2011. *Id.*

8. Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613 (S.D.N.Y. 1977).

9. The Donovan Leisure partner ultimately went to jail. Kodak lost at trial, but the Second Circuit reversed that determination on the ground that the measure of damages was improper. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2d Cir. 1979). Ultimately, Kodak settled the matter by paying Berkey a few million dollars.

10. *See, e.g.*, Wheeling-Pittsburgh Steel Corp. v. Underwriters Laboratories Inc., 81 F.R.D. 8 (N.D. Ill. 1978); James Julian, Inc. v. Ratheon Co., 93 F.R.D. 138 (D. Del. 1982); U.S. v. 22.80 Acres of Land, 107 F.R.D. 20 (N.D. Cal. 1985); Leybold-Heracus Technologies Inc. v. Midwest Investment Co., 118 F.R.D. 607 (D. Wis. 1987); In re Joint Eastern and Southern District Asbestos Litigation, 119 F.R.D. 4 (E.D.N.Y. & S.D.N.Y. 1988); Redvanly v. NYNEX Corp., 152 F.R.D. 460 (S.D.N.Y. 1993); Audiotext Communications Network v. US Telecom, 164 F.R.D. 250 (D. Kan. 1996).

11. 329 U.S. 495 (1947). *See* C.E. Stewart, "Good Golly Miss Molly!: The Attorney Work Product Takes Another Hit," NY Bus. L. J. (Winter 2012). Perhaps because most judges have been trial lawyers, many seem to bend over backwards to protect "core" work product, even when lawyers improperly put such materials at issue. *See, e.g.*, In re Kidder Peabody Securities Litigation, 168 F.R.D. 459 (S.D.N.Y. 1986).

12. *See, e.g.*, J. Weinstein & M. Berger, "Weinstein's Evidence Manual" (LexisNexis 2013).

13. *See, e.g.*, Sporck v. Peil, 759 F.2d 312 (3d Cir. 1985); A1-Rowarshan Establishment Universal Trading & Agencies, Ltd. v. Beatrice Foods Co., 92 F.R.D. 779 (S.D.N.Y. 1982); In re Comair Air Disaster Litigation, 100 F.R.D. 350 (E.D. Ky. 1983); Boring v. Keller, 97 F.R.D. 404 (D. Colo. 1983); Levacadia, Inc. v. Reliance Inc. Co., 101 F.R.D. 674 (S.D.N.Y. 1983); Nutramax Lab., Inc. v. Twin Lab, Inc., 183 F.R.D. 458 (D. Md. 1998); In re Riv. Astigmine Patent Litigation, 2007 WL 1029671 (S.D.N.Y. April 6, 2007).

14. *See Sporck*, 759 F.2d 312; *Al-Rowarshan Establishment Universal Trading & Agencies, Ltd.*, 92 F.R.D. 779; *In re Comair Air Disaster Litig.*, 100 F.R.D. 350; *Boring*, 97 F.R.D. 404; *Levacadia, Inc.*, 101 F.R.D. 674; *Nutramax Lab., Inc.*, 183 F.R.D. 458; *In re Riv. Astigmine Patent Litig.*, 2007 WL 1029671.

15. *Compare Sporck*, 759 F.2d 312, *with Nutramax Lab., Inc.*, 183 F.R.D. 458.

16. *See, e.g.*, Parry v. Highlight Indus., Inc., 125 F.R.D. 449 (W.D. Mich. 1989); *In re Comair Air Disaster Litig.*, 100 F.R.D. 350; *In re* Joint E. & S. Dist. Asbestos Litig., 119 F.R.D. 4 (E. & S.D.N.Y. 1988).

17. *See* Weinstein & Berger, *supra* note 12, at §10.05 (3), 10-30 (emphasis added).

18. 18 U.S.C. §1622. Another federal statute to keep in mind is 18 U.S.C. § 1512 (witness tampering). In the classic movie Anatomy of a Murder (Columbia Pictures 1959), my cousin Jimmy Stewart, in preparing his client, explains a legal defense to murder that prompts his client to "recall" facts consistent with such a defense. *See* Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 Duq. L. Rev. 715, 781–82 (1998). There seems to be a broad consensus that such conduct is more than one bridge too far. *See* Charles W. Wolfram, Modern Legal Ethics § 12.43 (1986); Peter A. Joy & Kevin C. McMunigal, *Witness Preparation: When Does It Cross the Line?* 17 Crim. Just. 48, 49 (2002).

19. 82 N.Y. 161, 171 (1880).

20. *See* State v. McCormick, 259 S.E.2d 880, 882 (N.C. 1979) (explaining that proper witness preparation is "preparing the witness to give the *witness'* [sic] testimony at trial and not the testimony that the attorney has placed in the witness' [sic] mouth.").

21. *See, e.g.*, In re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996); Goodsell v. The Mississippi Bar, 667 So. 2d 7 (Miss. 1996); In re Oberhellmann, 873 S.W.2d 851 (Mo. 1994); In re Edson, 530 A.2d 1246 (N.J. 1987). *See also* Joseph D. Piorkowski, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching,"* 1 Geo. J. Legal Ethics 389 (1987).

22. *See* J. Rogers, Ethics of Witness Preparation, ABA/BNA Lawyer's Manual on Professional Conduct (1998); *see also* Abner v. Elliot, 706 N.E.2d 765 (Ohio 1999); N. LeGrande & K. Mierau, *Witness Preparation and the Trial Preparation Industry*, 17 Geo. J. Legal Ethics 947 (2004).

23. *See supra* note 22. This is likely due to the facts that (i) a paralegal created the document, and (ii) no lawyer at the firm saw it or pre-approved its use. *See* R. Parloff, *The $200 Billion Miscarriage of Justice*, Fortune (March 4, 2002).

24. *See, e.g.*, L. Brickman & R. Rotunda, *When Witnesses Are Told What to Say*, Washington Post, Jan. 13, 1998, at A-15; C. Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 Texas Tech L. Rev. 1383 (1999); R. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 Pepperdine L. Rev. 175 (2004) (the law firm was also heavily criticized for, *inter alia*, being ethically challenged vis-à-vis client solicitation and presenting false expert testimony).

25. *See* R. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 Fordham L. Rev. 1599, 1603 (2002).

26. *Id.* at 1610. The profession's race to the bottom has also caught the attention of the U.S. Securities and Exchange Commission. *See* R. Morvillo, *Ethics and Preparing Witnesses for SEC Testimony*, N.Y.L.J. (April 3, 2004) ("scripts should be avoided").

C. Evan Stewart is a partner in the New York City office of Cohen & Gresser LLP, focusing on business and commercial litigation. He has published over 200 articles on various legal topics and is a frequent contributor to the *New York Law Journal* and this publication.