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## \*1 THE ETHICS OF WITNESS COACHING

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#### Introduction

The standard wisdom about the ethics of witness coaching can be briefly stated something like this:

First, a lawyer may discuss the case with the witnesses before they testify. [\[FN1\]](#) A lawyer in our common law adversary system has an ethical and legal duty to investigate the facts of the case, and the investigation typically requires the lawyer to talk with the witnesses -- the people who know what happened on the occasion in question. [\[FN2\]](#) Moreover, the adversary system benefits by allowing lawyers to prepare witnesses so that they can deliver their testimony\*2 efficiently, persuasively, comfortably, and in conformity with the rules of evidence. [\[FN3\]](#)

Second, when a lawyer discusses the case with a witness, the lawyer must not try to bend the witness's story or put words in the witness's mouth. As an old New York disciplinary case puts it: “[The 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.” [\[FN4\]](#)

Third, a lawyer can be disciplined by the bar for counseling or assisting a witness to testify falsely or for knowingly offering testimony that the lawyer knows is false. [\[FN5\]](#)

This Article focuses on the ethics of coaching cooperative lay witnesses (not adversary witnesses or expert witnesses). It discusses mostly United States law, but the problems it discusses exist also in England and other nations that use the common law adversary system. As used here, “witness coaching” means conduct by a lawyer that alters a witness's story about the events in question. Usually witness coaching occurs when a lawyer is interviewing a witness in the course of investigating the facts of the case or when a lawyer is preparing a witness to testify at a deposition or trial. Interviewing a witness to find out what happened is obviously different from preparing a witness to testify about what happened, but \*3 the two tasks blend together in practice. In the typical case, the lawyer initially is mainly investigating and only incidentally preparing the witness to testify; later in the case, however, the converse is true. Sometimes the lawyer has only one chance to talk to the witness before the witness testifies, so the lawyer must do both tasks at once. The ethical concerns are the same for the two tasks, and this Article therefore discusses them together.

The Article divides witness coaching into three grades, as follows:

Grade One witness coaching is where the lawyer knowingly and overtly induces a witness to testify to some-

thing the lawyer knows is false. “Overtly” is used to mean that the lawyer's conduct is “openly” or “on its face” an inducement to testify falsely. Grade One witness coaching obviously interferes with the court's truth-seeking function and corrodes the morals of both the witness and the lawyer. Sometimes it goes undetected by adversaries, judges, and disciplinary authorities, but when it is detected, it can and should be punished under the present lawyer disciplinary rules [\[FN6\]](#) and perjury statutes. [\[FN7\]](#)

Grade Two witness coaching is the same as Grade One, except that the lawyer acts covertly. Thus, Grade Two is where the lawyer knowingly but covertly induces a witness to testify to something the lawyer knows is false. “Covertly” is used to mean that the lawyer's inducement is masked. It is transmitted by implication. Grade Two witness coaching is no less harmful to the court's truth-seeking function than Grade One, nor less morally corrosive, nor less in breach of the lawyer disciplinary rules and perjury statutes, but it is less likely to be detected and successfully punished. This Article argues that Grade Two witness coaching falls within a range of conduct that cannot be effectively controlled by disciplinary rules or criminal laws and that it must therefore be controlled by a lawyer's own informed conscience. To have an informed conscience about witness coaching, a lawyer needs to understand how messages get transmitted covertly between a speaker and a hearer. To that end, this Article describes philosopher Paul Grice's “theory of conversational implicature” and suggests a method of analysis that incorporates Grice's theory. [\[FN8\]](#)

**\*4** Grade Three witness coaching is where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story. Given the malleable nature of human memory, Grade Three witness coaching is very hard to avoid. It lacks the element of corruption that Grades One and Two have, but it does alter a witness's story and can thus interfere with the court's truth-seeking function. Therefore, this Article argues, when a lawyer's conversation with a witness serves a proper purpose, such as refreshing the witness's memory, the lawyer should nonetheless conduct the conversation in the manner that is least likely to produce inaccurate testimony. How the lawyer can do that is discussed in the closing section of the Article.

## I. Why Lawyers are Allowed to Interview and Prepare Witnesses

Before returning to the three grades of witness coaching, we need a common store of information about lawyers talking to witnesses before the witnesses testify. What do lawyers do when they interview and prepare witnesses? What are the dangers? Why does the common law adversary system allow lawyers to interview and prepare witnesses?

### A. How Lawyers in the United States Interview and Prepare Witnesses

When an American lawyer interviews and prepares a witness, the lawyer typically does at least some of the following things: [\[FN9\]](#)

**\*5** discusses the witness's perception, recollection, and possible testimony about the events in question;

reviews documents and other tangible items to refresh the witness's memory or to point out conflicts and inconsistencies with the witness's story;

reveals other tangible or testimonial evidence to the witness to find out how it affects the witness's story;

explains how the law applies to the events in question;

reviews the factual context into which the witness's testimony will fit;

discusses the role of the witness and effective courtroom demeanor;

discusses probable lines of cross-examination that the witness should be prepared to meet;

rehearses the witness's testimony, by role playing or other means.

#### B. Comparison of American and English Practice [\[FN10\]](#)

To understand how English lawyers interview and prepare witnesses, one must remember that the legal profession in England is divided into two branches, solicitors and barristers. Some of the distinctions between the two branches have been abandoned in recent years, but solicitors remain the legal “generalists,” the first legal professional a lay person consults about a legal problem. Barristers, on the other hand, remain legal “specialists.” Barristers do not deal directly with the public. Rather, barristers are hired by solicitors or other professionals to perform specialized tasks such as drafting pleadings, rendering legal opinions in specialized fields of law, and doing the courtroom advocacy in major civil and criminal cases.

\*6 In a major civil [\[FN11\]](#) case, the litigation tasks are divided between the solicitor and the barrister. The solicitor advises the lay client, often without assistance, up to the point that litigation seems imminent. At that point, the solicitor usually hires a barrister to draft the pleadings, but the solicitor does what a U.S. lawyer would call the pretrial preparation. In particular, the solicitor interviews the witnesses and prepares them to testify. [\[FN12\]](#)

In the early stages of a major civil case, the solicitor typically interviews the witnesses on his side, using the same interview techniques that American lawyers use. [\[FN13\]](#) For each witness, the solicitor prepares a “proof of evidence,” which is a written statement of everything the witness knows about the case -- the good, the bad, the admissible, and the inadmissible. Some solicitors call it a “warts-and-all” statement. The proof of evidence is a confidential document [\[FN14\]](#) that the solicitor uses to inform the barrister about the facts of the case.

Some solicitors interview the witness, take careful written notes, and later draft the proof of evidence, but others dictate the proof of evidence in the witness's presence so that the witness can make suggestions as they go along. Under both methods, the witness reads and corrects one or more drafts, and ultimately the solicitor and witness arrive at a version that suits them both. The proof of evidence is truly a joint product of the solicitor and the witness; the witness provides the story line, but the solicitor supplies the organization, decides what to include and what to omit, and provides much of the wording.

As the pretrial phase of the case progresses, everyone learns more about the case, and the solicitor may talk with the witness several more times. The solicitor typically memorializes these subsequent conversations in improved versions of the proof of evidence.

\*7 English civil procedure does not allow the extensive deposition practice used in American civil cases. Instead, English litigants exchange witness statements prior to trial. [\[FN15\]](#) A witness statement is a written narrative of the evidence that the litigant could obtain from the witness on direct examination. [\[FN16\]](#) Unlike the warts-and-all proof of evidence, a witness statement is wart-free, meaning that it does not incorporate inadmissible material and that it presents the evidence in the light most favorable to its proponent. Typically, the solicitor and the witness produce a first draft, using the most recent proof of evidence as a guide. The solicitor sends the draft to the barrister, who frequently sends it back with proposed revisions and suggestions to get additional information from the witness. The solicitor works with the witness to prepare a new draft, which is again sent to the barrister. The process continues until the solicitor, the witness, and the barrister have developed a joint product that suits each of them. Although a witness statement is supposed to be expressed in “the language of the witness, his ipsissima verba,” [\[FN17\]](#) it typically shows the careful tool marks of the lawyers who craft it.

The witness statement serves two purposes. First, it helps eliminate surprises at trial; if the witness ultimately testifies on direct examination, he cannot say anything that is not said in the witness statement. [\[FN18\]](#) Second, starting in 1995, the witness statement is used at trial in lieu of direct examination, unless the trial judge orders otherwise; the witness simply gets in the witness box, adopts the written witness statement as his testimony, and is then cross-examined. [\[FN19\]](#)

**\*8** The solicitor typically prepares the witness for trial by having the witness carefully review the witness statement. The solicitor also explains the logistics of being a witness and imparts the usual cautions about listening carefully, not volunteering information not asked for, speaking clearly, and the like. Some solicitors end the preparation with some role playing, to help accustom the witness to the rigors of cross-examination, but other solicitors regard role playing as ethically suspect. [\[FN20\]](#)

By long tradition, the barristers in a major civil case almost never have direct contact with the witnesses (except their lay clients and their expert witnesses) until they face each other in the courtroom. [\[FN21\]](#) The ethics rule that embodied that tradition was repealed in 1995. [\[FN22\]](#) The repeal is not likely to change the way witnesses are interviewed and prepared in England because the practice standards that accompany the ethics rules were augmented in a way that effectively repeals the repeal. [\[FN23\]](#) The augmented practice standards strongly admonish barristers that discussing the evidence with a witness before trial can encroach on the solicitors' traditional turf [\[FN24\]](#) and can lead to suspicions of coaching, create a conflict of interest, and contaminate the witness's evidence. [\[FN25\]](#) The solemn admonitions about coaching and contamination ring a bit hollow in civil cases, now that live testimony on direct examination has been replaced by meticulously crafted witness statements.

#### **\*9 C. Dangers of Allowing Lawyers to Interview and Prepare Witnesses**

In England, the United States, and other nations that use the common law adversary system, one obvious danger of allowing lawyers to interview and prepare witnesses is the danger of Grade One and Two witness coaching: an unethical lawyer may be able to induce a witness to testify falsely. Another danger, more common than the first, is Grade Three witness coaching: a witness's memory of the events in question (and thus the witness's testimony about those events) may be affected by a conversation in which an ethical and well-meaning lawyer covers the topics and uses the interview techniques listed in section A, above.

Professor Monroe Freedman and later Professor John Applegate have drawn on the literature of psychology in their discussions of this second danger. [\[FN26\]](#) They argue that a human being's memory is not some kind of recording device that can create a distortion-free reproduction of the events in question. [\[FN27\]](#) At the outset, a witness's original perception of the events in question is colored by that witness's unique combination of "temperament, biases, expectations, and past knowledge." [\[FN28\]](#) Further, a witness typically perceives only parts of the events in question; this perception creates gaps that the witness fills in with inference, past experience, and conjecture. [\[FN29\]](#) Thus, a witness may honestly believe that she perceived some critical feature, when in truth that feature was one of the gaps that she filled in with a logical inference based on her past experience in similar situations.

As for retrieval of information from human memory, even a witness's unprompted, spontaneous recollection of the events in question produces a version that is heavily edited by the witness's own experiences, outlook, and perceived self-interest. [\[FN30\]](#) When a lawyer or other questioner guides the retrieval process with questions -- even non-suggestive questions -- the malleability of a witness's **\*10** memory becomes more apparent. [\[FN31\]](#) Suggestive questions can produce even more dramatic effects. For instance, the questioner's choice of verbs to describe two cars coming into contact (for example, "hit" vs. "smashed") can influence the witness's testimony about how fast the cars were actually going. [\[FN32\]](#)

If the lawyer's questions incorporate new material that a witness did not originally perceive, the new material

can affect the witness's ability to recount accurately what he did perceive. That is, the witness is likely to report the new material instead of, or along with, the material the witness originally perceived. [\[FN33\]](#) Psychologists who study this phenomenon disagree among themselves about how it happens: perhaps the original memory is lost and the new material takes its place; or perhaps the original memory remains but becomes harder to retrieve; or perhaps the witness gets his sources mixed up, believing that the new material came from his original perception; or perhaps the phenomenon can happen in several different ways, depending on the person and the circumstances. [\[FN34\]](#) Even if the psychologists do not yet agree on exactly **\*11** how it happens, they agree that it does happen -- an honest witness can easily be misled by new information that an ethical and well-intended lawyer puts into a suggestive question. [\[FN35\]](#)

Finally, skilled trial lawyers know that once a witness accepts a version of the story, that version can “harden” and become the reality so far as that witness is concerned. An English barrister of long experience used the following hypothetical piece of witness interview to illustrate the point:

Q) When Bloggs came into the pub, did he have a knife in his hand?

A) I don't remember.

Q) Did you see him clearly?

A) Yes.

Q) Do people in that neighborhood often walk into pubs with knives in their hands?

A) No, certainly not.

Q) If you had seen Bloggs with a knife in his hand, would you remember that?

A) Yes, of course.

Q) And you don't remember any knife?

**\*12** A) No, I don't remember any knife.

During the days or months between the interview and the trial, the story can harden, and what started as “I don't remember” may come out like this at trial:

Q) When Bloggs came into the pub, did he have a knife in his hand?

A) No, he did not. [\[FN36\]](#)

#### D. Why Lawyers are Allowed to Interview and Prepare Witnesses

If human memory is as malleable as the foregoing section suggests, and if a trial is supposed to be a search for the truth, [\[FN37\]](#) why then are lawyers allowed to interview and prepare witnesses? It is allowed because it makes our adversary system work better than it would if the rule were otherwise. In our adversary system, the court is passive and cannot, as a general rule, gather the facts for itself. [\[FN38\]](#) The parties' lawyers are responsible for finding out what **\*13** the facts are, straining out what is not relevant, organizing what is relevant, and presenting the relevant material to the court in a coherent and convincing manner. Except in the rare case that involves no testimonial evi-

dence, the lawyers could not perform those functions adequately without talking to the witnesses before they testify.

Consider a hypothetical case. Suppose that wholesale butcher B sues meat supplier S for selling off-condition meat to B on three occasions last August. S admits that the meat in the three shipments was off-condition when it arrived at B's place of business. S alleges, however, that the meat was in proper condition when it was picked up at S's loading dock by B's own truck driver, and that the fault lay with the truck driver for failing to keep the meat properly chilled during transit.

Suppose that one of S's employees is quality control inspector Q, who inspected the three shipments and filled out a quality control sheet for each one. When S's lawyer first interviews Q, he cannot remember anything about those particular shipments. Should S's lawyer be allowed to show Q the quality control sheets for those shipments, and should she be allowed to discuss them in detail with Q? Yes, certainly, for several reasons. If S's lawyer correctly understands Q's notations on the quality control sheets, she will be better able to formulate S's defense. Further, examining the quality control sheets may refresh Q's memory about those three shipments, thus unlocking evidence that would otherwise be unavailable. Finally, if S's lawyer uses the quality control sheets and other relevant documents when preparing Q to testify, Q will doubtless be a better witness -- not just better for S, but better for the system. When Q takes the witness stand, his mind will be focused on the important facts, he will not waste time puzzling over documents that he has not seen for months or years, and his testimony will probably be briefer and more coherent than it otherwise would be.

Suppose B's lawyer is going to take Q's deposition. While preparing for the deposition, S's lawyer finds some evidence that, on one interpretation, could show that Q did not accurately check the internal temperature of the meat in a few shipments last August. \*14 May S's lawyer confront Q with that evidence and quiz him about it before the deposition? Yes, for at least two reasons, even though alerting Q to the evidence will prevent B's lawyer from surprising Q with it at the deposition. First, Q may have a perfectly harmless explanation for the evidence. On the other hand, the evidence may demolish S's defense. The sooner S's lawyer discusses the evidence with Q, the sooner she can advise her client of its significance and the more likely the dispute between B and S can be resolved promptly and justly. Second, seeing the evidence in advance helps Q understand the factual context into which his testimony will fit. Understanding the context may help Q remember things that he had forgotten about the shipments, or it may prompt Q to mention some detail that at first seemed irrelevant but that is critical once the factual context becomes clear.

Suppose that S's lawyer decides to use Q as a trial witness, and suppose that Q has never testified in court before. May S's lawyer instruct Q about the role and obligations of a witness? Yes, certainly. Doing so should help put Q at ease [\[FN39\]](#) and should impress him with the importance of being accurate and truthful.

May S's lawyer tell Q not to guess or speculate, to listen carefully to questions, and not to volunteer information that has not been asked for? Again, yes. These three items of advice are based on fundamental principles of evidence law, and a witness who does not follow them can be a menace at trial. [\[FN40\]](#)

\*15 May S's lawyer advise Q to dress neatly, to look at the jury when answering, to speak distinctly, to avoid distracting behavior, to avoid quibbling with the opponent's lawyer, and the like? Yes, certainly. Some witnesses know these things by intuition, but others need to be told. The lawyer's advice helps level the playing field and lessens the risk that a meritorious cause may be harmed simply because an important witness looked unkempt, or talked with his hand over his mouth, or stared at the floor and mumbled.

May S's lawyer rehearse the testimony with Q, by role playing or some other method? The answer depends on what "rehearse" means. If it means that the lawyer and witness devise a plausible story and then practice it until they can run through it like actors through a script, then this rehearsal is both ethically objectionable and tactically foolish. It is tactically foolish because an over-smooth direct examination is likely to sound contrived, especially in con-

trast with a rocky cross-examination. [\[FN41\]](#) Further, it opens the witness to impeachment on the ground that the testimony was concocted with the lawyer's help. [\[FN42\]](#) The ethical objections are well expressed by Professor Aplegate:

Witness preparation should be channeled into those methods that permit partisan case development but present the least threat of impaired fact finding. . . . 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. [\[FN43\]](#)

**\*16** On the other hand, "rehearse" is sometimes used to refer to practices that are ethically and tactically unobjectionable. [\[FN44\]](#) These practices include quizzing the witness on every topic the lawyer plans to cover on direct examination and every topic the adversary lawyer is likely to cover on cross-examination. There is no ethical reason to keep witnesses in the dark about the topics on which they will be questioned. Indeed, giving the witness a chance to think about the topics will produce testimony that is more focused and complete than if the witness were taken by surprise in the courtroom.

Witness preparation sessions often end with role playing by the lawyer and witness. Typically, the lawyer questions the witness on several topics using the style she will use during direct examination. Then she, or one of her colleagues, cross-examines using the style the adversary lawyer is likely to use. If the purpose of role playing is merely to accustom the witness to the rough and tumble of being questioned, then it is ethically unobjectionable. [\[FN45\]](#) If, however, the lawyer uses the role playing session as an occasion for scripting the witness's answers, then it is unethical.

#### E. Legitimate Reasons for a Lawyer's Statement or Question to a Witness

By expanding somewhat on the hypothetical discussed in section D, above, we can create a list of legitimate reasons why a lawyer may need to make a particular statement or ask a particular question when interviewing and preparing a witness. Later, in Part IV, below, we will use this list when analyzing Grade Three witness coaching. The list, which contains some overlapping items and which is doubtless incomplete, includes the following legitimate reasons for making a particular statement or asking a particular question:

- \*17** to investigate the facts, that is, to find out about the events in question;
- to find out what the witness perceived and can testify to from personal knowledge;
- to determine how accurately the witness perceived the events and what conditions may have hindered or assisted his perception;
- to test the witness's memory about what he perceived;
- to discover how certain the witness is about what he remembers;
- to determine adverse or favorable conditions that may have affected the witness's memory;
- to refresh the witness's memory of things he once remembered but has since forgotten;
- to find out whether exposure to relevant documents, other items of tangible or testimonial evidence, or some



non-evidentiary stimulus will help refresh the witness's memory;

to test the witness's ability to communicate his recollections accurately;

to find out what the witness means by words or expressions he used in his story;

to test the witness's truthfulness;

to warn the witness that his credibility may be attacked and that some kinds of acts in his past may be exposed in open court;

to ascertain whether the witness has a good or bad character as respects truthfulness;

to find out whether the witness has previously been convicted of a crime that could be used to impeach his credibility;

to uncover instances of non-criminal conduct that could be used to impeach the witness's credibility;

to discover whether the witness's story has been influenced by bias or prejudice;

to find out whether the witness's story has been influenced, properly or improperly, by the statements or conduct of some other person;

to find out whether the witness has previously made statements that are either consistent or inconsistent with his present story;

to test the witness's demeanor in response to various stimuli he may encounter when he testifies (for example, the witness's likely response to harsh questioning by a cross-examiner);

**\*18** to explain the role of a witness, the obligations imposed by the oath, and the formality of court proceedings;

to inform the witness about the physical surroundings in which he will testify, the persons who will be present, and the logistical details of being a witness;

to explain to the witness why he should listen to questions carefully, not guess, not volunteer information that has not been asked for, be alert to objections, and the like;

to advise the witness about appropriate attire and physical appearance in court, distracting mannerisms, inappropriate language and demeanor, and the effective delivery of testimony.

## II. Grade One Witness Coaching

In this Article, “witness coaching” means conduct [\[FN46\]](#) by a lawyer that alters a witness's story about the events in question. (Of course non-lawyers can coach witnesses too, but that is not discussed here.) This Article divides witness coaching into three grades, as explained below.

Grade One witness coaching occurs when the lawyer knowingly and overtly induces a witness to testify to



something the lawyer knows is false. It is grounds for professional discipline [\[FN47\]](#) and, under specified circumstances, can be criminally punished as subornation of perjury. [\[FN48\]](#)

#### \*19 A. Knowing Inducement

The definition of Grade One witness coaching speaks of a lawyer who “knowingly” induces false testimony. Let us use The Model Rules of Professional Conduct (“Model Rules”) definition: “knowingly” means that the lawyer has “actual knowledge,” but with the admonition that knowledge can be inferred from the circumstances. [\[FN49\]](#) What is it that the lawyer must know? Here we should focus on the likely results of the lawyer's conduct: how will the lawyer's conduct be interpreted by the witness? The knowledge element should be satisfied if the lawyer knows that the witness is “practically certain” to interpret the lawyer's conduct as an inducement to testify falsely. [\[FN50\]](#)

#### B. Overt Inducement

The definition of Grade One witness coaching speaks of a lawyer who acts “overtly” as well as knowingly. (Note that lawyer disciplinary rules and perjury laws do not use the terms “overt” and “covert”; they do not distinguish between overt and covert inducement.) “Overtly” means that the lawyer's conduct is “openly” or “on its face” an inducement to testify falsely.

#### Example One

As an example of overt inducement, suppose that lawyer L represents plaintiff P in a tort suit against defendant D. Suppose it is important in the case to know how far apart P and D were standing at the time in question. If the distance was 100 yards or less, that will help P's case, but if it was more than 100 yards, that will help D's case. Further, suppose that L knows that the distance was about 150 yards; she knows this from an unquestionably reliable source that is privileged and therefore unavailable to D. Finally, suppose that the following conversation takes place the first time L interviews eyewitness W, who is P's best friend and is therefore quite cooperative:

2 Q)At the time in question, were you standing where you could see both P and D?

\*20 3 A) Yes.

4 5 6 Q) Let me be frank. In this lawsuit it would be very helpful to P if the distance between P and D were less than 100 yards. Could you help us out on that?

7 A) Oh, I'm quite sure it was less than 100 yards.

L's inducement appears at lines 4 - 6. It is overt because one can read L's statement and fairly conclude that L is offering W a way to benefit his friend P by giving testimony that L knows is false. The inducement is not as blatant as an offer to give W a new car if he testifies favorably, or to break his legs if he testifies unfavorably, but the inducement is obvious enough from the face of L's statement to be called overt.

#### C. Known False Testimony

The definition of Grade One witness coaching speaks of a lawyer who “knows” that the witness's testimony is false. Here again, let us use the Model Rules definition: “know” means that the lawyer must have actual knowledge that the witness's testimony is false, but the lawyer's knowledge can be inferred from the circumstances. [\[FN51\]](#) Professors Hazard and Hodes explain the significance of inferring actual knowledge from the circumstances:

This practical method of proof has enormous significance. Even where a violation requires “knowledge,” the circumstances may be such that a disciplinary authority will infer that a lawyer must have known. In such a case the lawyer will be legally chargeable as if actual knowledge had been proved. In terms of what can be proved, the “knows” standard thus begins to merge with the “should have known” standard, for often it will be impossible to believe that a lawyer lacked knowledge unless he deliberately tried to evade it. But one who knows enough to try to evade legally significant knowledge already knows too much. [\[FN52\]](#)

In Example One, above, we preloaded the rabbit into the magic hat [\[FN53\]](#) by assuming that lawyer L knew from an unquestionably accurate source that the distance was about 150 yards; it was no \*21 trick to conclude that L knew it would be false for W to testify that it was less than 100 yards. [\[FN54\]](#)

#### Example Two

Suppose the facts are as stated in Example One, but with two differences. First, suppose that lawyer L does not know how far apart P and D were standing. Second, suppose that L's initial conversation with W goes like this:

2 Q) At the time in question, were you standing where you could see both P and D?

@3 4 A) No. I was home sick that day, and I know nothing at all about this matter.

5 6 7 Q) Let me be frank. In this lawsuit, it would be very helpful to P if the distance between P and D were less than 100 yards. Could you help us out on that?

8 9 A) Sure. I'm willing to testify that I was there and saw them standing less than 100 yards apart.

If L offers W's testimony at trial that he saw P and D standing less than 100 yards apart, L would be offering testimony that L knows is false. L does not know the distance between P and D, but she does know what W believes about that subject. More precisely, L knows that W has no belief at all about that subject, because he was not there and has no basis for any belief. Thus, L knows that W's testimony is a false statement of what W believes. [\[FN55\]](#)

Examples One and Two teach us an important lesson: the requirement of known false testimony can be met in two ways. First, the lawyer may know that the testimony is a false statement of the events in question (for example, the distance between P and D). \*22 Second, the lawyer may know that the testimony is a false statement of what the witness believes about the events in question. [\[FN56\]](#) To further illustrate this point, consider a third example that falls between the first two:

#### Example Three

Suppose the facts are as stated in Example One, but with two differences. First, suppose that L does not know how far the distance was between P and D. Second, suppose that L's initial conversation with W goes like this:

@1 Q) At the time in question, could you see both P and D?

2 3 4 5 A) Yes, and I remember vividly that P was wearing a red woolen shirt and was standing beside the big oak tree, while D was standing at the edge of the pond, about 150 yards from P, and was wearing a purple tutu.

6 7 8 Q) Let me be frank. In this lawsuit, it would be very helpful to P if the distance between P and D were less than 100 yards. Could you help us out on that?

9 10 A) Sure. I am willing to testify that I saw them standing less than 100 yards apart.

Here, as in Example Two, if L offers W's testimony at trial that W saw P and D standing less than 100 yards apart, L would be offering testimony that she knows is false. L does not know the distance between P and D, but she does know what W believes about that subject -- W has a vivid memory that they were standing about 150 yards apart. Thus, L would be offering testimony that she knows is a false statement of what W believes. [\[FN57\]](#)

#### D. The Consequences of Grade One Witness Coaching

Two consequences of Grade One witness coaching have already been mentioned -- the lawyer is subject to professional discipline and, under specified circumstances, the lawyer is also subject \*23 to criminal punishment for subornation of perjury. [\[FN58\]](#) As a practical matter, however, one rarely comes across a discipline case or a criminal case in which a lawyer is accused of such blatant misconduct. While we would like to believe that the main reason such cases are rare is that the misconduct is rare, an additional reason is the low chance of the misconduct being reported. [\[FN59\]](#) Lawyers typically interview and prepare witnesses in private surroundings, preferably in a quiet office with the door closed and with no strangers present. Because Grade One witness coaching is so obviously dishonest, no sensible lawyer would try it with a witness who might be inclined to report it, or in the presence of a third person who might be inclined to report it. Further, the work product immunity, [\[FN60\]](#) and sometimes the attorney-client privilege, [\[FN61\]](#) help shield conversations between lawyers and witnesses from probing by adversary counsel. [\[FN62\]](#)

A third consequence of Grade One witness coaching is that it may produce false testimony. If the falsity is not subsequently exposed on cross-examination, it may cause the court to reach the wrong conclusion in the case. The wrong conclusion may cause injustice, not just to the litigants, but also to anyone else whose life it touches. Moreover, if people come to believe that judicial trials often produce wrong conclusions, they may start resolving their disputes in other ways. [\[FN63\]](#) Arbitration and mediation come quickly to mind, but so do fist fights and drive-by shootings.

A fourth consequence of Grade One witness coaching is its corrosive effect on the morals of the lawyer who induces the false \*24 testimony and the witness who utters it. [\[FN64\]](#) To make a false statement under oath, knowing that it is false, is an extreme form of lying. Sissela Bok explains how lying corrodes the morals of the liar. [\[FN65\]](#) Borrowing from an economics analysis, she calls the liar a "free rider," a person who claims for himself alone the choice between telling lies and telling the truth, while insisting that everybody else must tell only the truth. [\[FN66\]](#)

A lie affects the liar personally in several ways. First, Professor Bok says, the liar knows that he lied, and that knowledge can destroy his integrity. [\[FN67\]](#) Second, after the lie, the liar must be more cautious of the people he deceived; they could discover the deception, and their discovery could ruin him. [\[FN68\]](#) Third, lies seldom come as singles:

It is easy, a wit observed, to tell a lie, but hard to tell only one. The first lie "must be thatched with another or it will rain through." More and more lies may come to be needed; the liar always has more mending to do. And the strains on him become greater each time -- many have noted that it takes an excellent memory to keep one's untruths in good repair and disentangled. The sheer energy the liar has to devote to shoring them up is energy the honest man can dispose of freely. [\[FN69\]](#) Fourth, after the first lie, others come more easily. Lying seems more necessary and less reprehensible, and the liar gradually loses the ability to distinguish the moral from the immoral. [\[FN70\]](#)

Professor Bok's arguments apply equally to the lawyer who induces the witness to lie. In some ways the corruptor's conduct is worse than the corruptee's, [\[FN71\]](#) and in some periods of English history, a suborner of perjury could be punished more severely than the perjurer. [\[FN72\]](#)

### \*25 III. Grade Two Witness Coaching

Grade Two witness coaching is similar to Grade One, except that the lawyer acts covertly rather than overtly. Thus, Grade Two witness coaching is where the lawyer knowingly but covertly induces a witness to testify to something that the lawyer knows is false.

#### A. The Knowledge Elements

The “knowing inducement” element is the same as for Grade One: the lawyer must have actual knowledge, which can be inferred from the circumstances, that the witness is practically certain to interpret the lawyer's conduct as an inducement to testify falsely. [\[FN73\]](#) Likewise, the “known false testimony” element is the same as for Grade One. That is, the lawyer must have actual knowledge, which can be inferred from the circumstances, that the witness is making a false statement about either of two things: (a) the events in question or (b) what the witness believes about the events in question. [\[FN74\]](#)

#### B. Covert Inducement

As used here, “covert” inducement means that the lawyer's inducement is masked. It is transmitted by implication. To use the common image, the lawyer sends the witness a message “between the lines” about how to tell the story. If the witness understands the message and wants to cooperate, he alters the story accordingly.

Rare is the legal ethics student who is not familiar with “the Lecture scene” from the novel and movie *Anatomy of a Murder*. [\[FN75\]](#) That scene can best be understood as an example of Grade Two witness coaching. Lawyer Biegler is defending client Manion against a charge of murdering a man who allegedly raped Manion's wife. At their first interview, Manion tells Biegler that he killed \*26 the man, and that he did it an hour or so after learning of the rape. [\[FN76\]](#) When Biegler hears about the time lapse, he stops the interview, knowing that “a few wrong answers to a few right questions” could mean first degree murder and life in prison for his client. [\[FN77\]](#) At the outset of their next meeting, Biegler gives Manion “the Lecture,” meaning in this case a step by step explanation of the law of murder and the possible defenses. [\[FN78\]](#) As Biegler leads Manion through the explanation, Manion begins to understand that his only possible defense is a type of insanity. Being thus enlightened about his self-interest, Manion then describes his mental state at the time of the crime in a way that allows Biegler to invoke the insanity defense. [\[FN79\]](#) In an aside directed to any reader who might miss the point, Biegler explains:

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical . . . Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. “Who, me? I didn't tell him what to say,” the lawyer can later comfort himself. “I merely explained the law, see.” It is a good practice to scowl and shrug here and add virtuously: “That's my duty, isn't it?” [\[FN80\]](#)

#### C. Reasons for Covert Inducement

Why might a lawyer who is bent on concocting false testimony prefer to induce it covertly rather than overtly? Lawyer Biegler's explanation of the Lecture, above, suggests two closely related reasons.

The first reason is the desire to save face. Let us assume that most people -- including lawyers and witnesses -- do not want to be perceived by others as dishonest. If a lawyer overtly induces a witness to lie, and if the witness refuses, the lawyer loses face because the witness now perceives the lawyer as dishonest. Similarly, if the witness accepts the lawyer's overt invitation and tells a lie, both the lawyer and the witness lose face because each now per-

ceives the other as dishonest.

\*27 Covert inducement is less risky for both the lawyer and the witness. If the lawyer covertly induces the witness to lie, and if the witness refuses, the lawyer can save face by treating the inducement as something different, something legitimate: “ ‘Who, me? I didn't tell him what to say . . . I merely explained the law . . . That's my duty, isn't it?’ ” [\[FN81\]](#) Similarly, if the witness accepts the lawyer's covert invitation and tells a lie, both the lawyer and witness can save face by treating the inducement as legitimate and the lie as truthful. [\[FN82\]](#)

The second reason for covert, rather than overt, inducement is the lower risk of being reported and punished. If the risk of being reported for Grade One witness coaching (overt inducement) is low, as argued in Part II.D., above, the risk of being reported and punished for Grade Two witness coaching (covert inducement) is lower still. By definition, covert inducement is not apparent on the face of the conversation between the lawyer and the witness. Lawyer Biegler's conversation with client Manion might actually be a good faith lesson on the applicable law rather than an invitation to lie, and that ambiguity should give pause to any observer or eavesdropper who considers reporting Biegler. If someone does report Biegler, the ambiguity of the conversation still gives him a fair chance to escape punishment by arguing that he was misunderstood and that his motive was pure.

#### D. Consequences and Control of Grade Two Witness Coaching

Grade Two witness coaching is no less harmful than Grade One to the court's truth-seeking function, nor to the morals of the lawyer and witness, nor is it any less serious a violation of disciplinary rules or subornation of perjury statutes. [\[FN83\]](#) However, the low risk of reporting and punishment suggests that disciplinary rules and subornation statutes can do little to control Grade Two witness coaching. The primary control must be each lawyer's own informed\*28 conscience. To have an informed conscience on this topic, the lawyer needs to understand how messages get transmitted covertly between a speaker and a hearer. That is where philosopher Paul Grice enters the story.

#### E. Grice's Theory of Conversational Implicature

The English philosopher Paul Grice taught at Oxford from 1938 until 1967. [\[FN84\]](#) In 1967 he was invited to Harvard to give the William James lectures, and later that year he joined the philosophy faculty of the University of California, Berkeley, where he remained until his death in 1988. [\[FN85\]](#) One subject Grice discussed in his William James lectures was the supposed difference in meaning between the symbols used in formal logic and their natural language counterparts. [\[FN86\]](#) As part of that discussion, Grice posed his theory of conversational implicature. The theory ultimately made him famous in the branch of linguistics called pragmatics. [\[FN87\]](#)

##### 1. The Words and the Message

Grice begins explaining his theory with the observation, familiar to all of us, that what a speaker says is often different from the message the speaker wants to send the hearer. [\[FN88\]](#) Grice uses the word “say” to denote the conventional meaning of the speaker's words, [\[FN89\]](#) what a lawyer might call the meaning of the “words on \*29 their face.” [\[FN90\]](#) He then creates a term of art, “implicature,” to denote the message that the speaker wants to send the hearer. [\[FN91\]](#)

Sometimes, of course, the speaker's implicature is the same as what she says. (For example, if my wife looks out the window and tells me, “it is raining,” her implicature may be just what she says: water is falling from the sky.) Other times a speaker's implicature is something other than what she says. (For example, if I am bidding my wife farewell before leaving the house for the day and she says “it is raining,” her implicature may be a piece of advice, “take your umbrella.”)

##### 2. The Cooperative Principle of Conversation

Grice observed that conversations between people are not ordinarily a series of disjointed utterances. [\[FN92\]](#) Rather, they are a cooperative endeavor, with a common purpose or direction. [\[FN93\]](#) A conversation's agenda might be fixed (as when an attorney is preparing a witness to testify), or it might be fluid (as when two friends chat over lunch). Whether the agenda is fixed or fluid, the participants are governed by an overarching principle: each participant must make his or her “conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction” of the conversation. [\[FN94\]](#) Grice calls this the “Cooperative Principle” of conversation. [\[FN95\]](#)

### 3. The Conversational Maxims

The Cooperative Principle can be divided into four parts: Quantity, Quality, Relation, and Manner. [\[FN96\]](#) These, in turn, can be expressed in maxims, as follows: [\[FN97\]](#)

#### QUANTITY

1. Make your contribution as informative as is required for the purpose of the conversation (that is, do not say too little).
2. Do not make your conversation more informative than is required (that is, do not say too much).

#### \*30 QUALITY

1. Do not say what you believe to be false.
2. Do not say that for which you lack adequate evidence.

#### RELATION

Make your contribution relevant to the conversation.

#### MANNER

1. Avoid obscurity of expression.
2. Avoid ambiguity.
3. Be brief.
4. Be orderly.

### 4. Following and Flouting the Maxims

Every speaker in a conversation makes an implied pledge to follow the maxims, [\[FN98\]](#) but sometimes the pledge is broken. For example, a speaker might surreptitiously violate the first maxim of quality if she makes a statement that she knows is false for the purpose of deceiving the hearer. [\[FN99\]](#)

Sometimes a speaker flouts a maxim, that is, blatantly violates the maxim, making the violation obvious to the

hearer. [FN100] The speaker's purpose is to raise a conversational implicature and thus to send an unstated message to the hearer. [FN101] Alerted by the speaker's blatant violation of the maxim, the hearer interprets the speaker's statement as though it did follow the maxim. [FN102] Consider the umbrella example again. When I bid my wife a fond farewell before departing for the day, I anticipate a response that pertains to fondness, or departure, or both. Instead I get a weather report, "It is raining." That is irrelevant to the matter at hand. My wife has flouted the maxim of relevance. That warns me that I must interpret her statement as though it were relevant. I thus discover her fond, unstated departure message, "Take your umbrella, dear, so you won't get wet and catch cold." That is a conversational implicature.

## 5. Other Examples of Conversational Implicature

### Example Four

Suppose that your brother-in-law Fred is a dentist and that for years you have endured as his patient solely to keep peace in the \*31 family. Now one of your friends is seeking a new dentist and asks you point-blank whether to select Fred. You respond as follows: "Fred is my brother-in-law, and he has been my dentist ever since I got married. Fred is a very nice guy and a real baseball fan. He has a wonderful sense of humor. His jokes will certainly keep you laughing in the dentist's chair."

What will your friend conclude? She will conclude that she should not select Fred, even though you have said only good things about him. Your response to her inquiry flouts the first maxim of quantity because it is not informative enough for the purpose at hand. It says nothing about Fred's dental skills, fees, honesty, or other things one might wish to know when selecting a dentist. Your friend will easily grasp your conversational implicature, the covert message you sent between the lines: "Stay away from Fred."

### Example Five

This example comes, unfortunately, from my own childhood. [FN103] One afternoon my aged and very dignified grandmother was serving tea to me and to one of her equally aged and dignified friends, Mrs. VanArsdale. Mrs. VanArsdale was kindly trying to include me in the conversation, and she asked whether I knew the Owens family, who lived on our side of town. I said I did. She then asked if I knew Margaret Owens, who was about my age. I said, "Sure, I know her -- she's the ugliest girl in our school." My grandmother quickly said, "Hasn't the heat been dreadful this summer!"

Later, in private, my grandmother explained that Margaret Owens was Mrs. VanArsdale's niece. By interjecting her comment about the summer heat, my grandmother had flouted the maxim of relevance, and the conversational implicature she aimed at me was too obvious to miss, "Do not say one more word about Margaret Owens!"

### Example Six

Suppose lawyer L tends toward verbosity when drafting legal opinion letters. Supervising partner S writes the following comment beside one of the paragraphs of L's draft: "It is not entirely beyond the reach of one's imagination to suppose that it would have been possible for you, given sufficient time and thought, to have expressed the information contained in this paragraph in a \*32 larger number of words than you have here employed." What message will L derive from this?

S has flouted the third maxim of manner -- be brief. The conversational implicature should be obvious to L: revise the paragraph to reduce the verbosity.

## F. Application of Grice's Theory to Grade Two Witness Coaching



To see how Grice's theory can help us understand Grade Two witness coaching, [\[FN104\]](#) let us suppose that plaintiff P has sued defendant D Company for millions of dollars on some civil claim, the nature of which need not concern us. One of the issues in the case involves a certain meeting between representatives of P and D Company. P asserts that at the meeting, Ms. E (a high-ranking executive of D Company) made statements X, Y, and Z. If Ms. E did make any one or all of those statements, it will benefit P's case and harm D Company's defense.

Two representatives of P were present at the meeting. D Company was represented by Ms. E, who took along her assistants \*33 Mr. A and Ms. B. Nobody else was present, and nobody else has personal knowledge [\[FN105\]](#) of what was said at the meeting.

Suppose that lawyer L is interviewing Mr. A for the first time to find out what A remembers about the meeting. Suppose, further, that L does not know what was said at the meeting. [\[FN106\]](#) L would, of course, like to develop evidence that Ms. E did not say X, Y, or Z at the meeting. Suppose that the critical part of the interview goes like this:

#### Example Seven

1 Q) At the meeting, did Ms. E say X?

2 A) No, I am quite certain she didn't.

3 Q) Did she say Y at the meeting?

4 A) Again, I am quite certain that she did not.

5 Q) At the meeting, did Ms. E say Z?

6 7 A) Well, you know, as to Z, yes, I think she may very well have said Z.

8 9 10 Q) O.K. now, I need to make sure that I understand correctly what you are telling me. You are absolutely certain that E did not say X, is that right?

11 A) Yes, that's right.

12 13 Q) And you are absolutely certain that E did not say Y, is that right?

14 A) Yes, that's right.

15 16 17 Q) And as to Z, you say "I think," but you aren't certain? Am I correct in believing that you simply do not know one way or the other as to Z?

18 A) Yea, I guess that's right.

19 20 21 22 Q) So you remember for certain that she did not say X, and you remember for certain that she did not say Y, but you do not remember one way or the other about Z, is that right?

23 A) Right.

What is happening on lines 15-17? In Grice's terms, lawyer L is flouting the first maxim of quality. That is, he is making a statement that he knows is false, [\[FN107\]](#) and he is doing it blatantly, so that \*34 A will be alert to the covert message. L's statement is false because it butchers what A said on lines 6- 7. There A said he thinks that E "may very well have said Z." On lines 15-17, L turns that into a statement that A does "not know one way or the other" about Z.

Bearing in mind that A is an employee of D Company and that Ms. E is A's immediate superior, what is likely to be the covert message in lines 15-17? Isn't it something like this: "Look, A, I am trying to defend your employer, D Company, and to keep your boss, E, out of trouble -- please don't tell me that E may have said Z at the meeting!" On line 18, A acquiesces in L's false paraphrase, and lines 18-23 show A agreeing to L's further refinement, a statement that A does not remember about Z one way or the other. Thus L transforms A's perhaps uncertain memory that E "may well have said" Z into a lack of memory about Z. That is an example of Grade Two witness coaching. It is unethical, and it is bad tactics as well.

What should L have done differently? Bearing in mind that this is L's first interview with A, shouldn't L be trying to find out what E really said at the meeting? Doesn't L need to know that information in order to advise D Company about whether and how to defend the case?

Focus again on A's statement on lines 6- 7: "Well, you know, as to Z, yes, I think she may very well have said Z." Notice that A opens with "well," a clue that A may be uncomfortable with what he is about to say. [\[FN108\]](#) Notice also that A says he is "quite certain" about X and Y, but he uses waffle words about Z, saying that he "thinks" Ms. E "may very well have said Z." Lawyer L should have used a series of non-leading questions to find out why A is uncomfortable and is waffling. Perhaps A simply does not like being the bearer of bad news. On the other hand, perhaps A is sincerely uncertain about statement Z. If so, why? Perhaps he could not hear well during that part of the meeting, or perhaps something has distorted his memory of that part of the meeting? Lawyer L should be trying to answer questions such as those, rather than trying to alter A's story to fit L's preconceived pattern of the case.

#### \*35 Example Eight

Suppose the facts are as stated above, except that the critical part of the interview goes like this:

1 Q) At the meeting, did Ms. E say X?

2 A) No, I am quite certain she didn't.

3 Q) Did she say Y at the meeting?

4 A) Again, I am quite certain she did not.

5 Q) At the meeting, did Ms. E say Z?

6 7 8 A) She may have, but she would have said it strictly in her personal capacity, not as a representative of D Company. She wouldn't have said it for D Company.

9 10 11 12 13 14 Q) Where a high-ranking corporate executive attends a meeting in a representative capacity, the law presumes that all of the executive's statements are authorized by and attributable to the corporate principal. In this case, we must assume that there is no such thing as E saying something at the meeting in her private capacity.

15 16 17 A) Yes, yes, but the point is that she wouldn't say such a thing speaking for D Company. She couldn't have said Z at the meeting -- I'm sure of it.

18 19 20 Q) So you're telling me that Ms. E did not make any of the three statements, X, Y, or Z, at the meeting, is that right?

21 A) Right.

Notice that the topic of lines 1-8 is what E said or did not say at the meeting. On line 9, L launches into a legal lecture, much the same as lawyer Biegler gave client Manion in *Anatomy of a Murder*. [\[FN109\]](#) Grice would say that on lines 9-14, lawyer L flouts the maxim of relevance. The likely conversational implicature is something like this: "A, your last statement (lines 6-8) harms D Company's case, and the legal explanation you have cooked up is not going to work. You'd better find some other way out." On lines 15-17, A indicates that he gets the covert message, and he clumsily backpedals into safer territory. On lines 18-21, A accepts L's altered and very helpful version of the story. Thus the harmful statement that E "may have" said Z is transformed into the helpful statement that E "did not" say Z.

In Example Eight, lawyer L could probably escape bar discipline or a subornation of perjury conviction by arguing that she did not "knowingly induce" A to lie and that she did not "know" that <sup>36</sup>L's altered story was false. [\[FN110\]](#) However, the low chance of getting punished does not mean that L's conduct was ethically proper. To decide what is ethically proper in Example Eight, L needs to use her informed conscience. At the time of her conversation with A, L herself knows the answers to two key questions:

1. Does L regard A's harmful statement (lines 6-8) as a clear and complete expression of A's belief about what E said at the meeting?

2. If so, does L intend her agency lecture to cause A to suppress the harmful statement and to come up with something better? If the answer to both questions is "yes," then L's informed conscience ought to tell her not to give the agency lecture.

#### Example Nine

Suppose the facts are as stated in Example Seven, except as follows. Suppose that before lawyer L talks to Mr. A, she has already interviewed Ms. E's other assistant, Ms. B. Ms. B told L that she is certain E did not say X, Y, or Z at the meeting. However, B remembers that when E, A, and B were walking back to their office after the meeting, they stopped for a cup of tea. E was in a jovial mood, and at the tea shop E made statement Z to A and B in a joking manner. (Assume that saying Z jokingly to one's co-workers has no legal consequence and could not harm D Company's case.) Finally, suppose that the critical part of lawyer L's interview with Mr. A goes like this:

1 Q) At the meeting, did Ms. E say X?

2 A) No, I am quite certain she didn't.

3 Q) Did she say Y at the meeting?

4 A) Again, I am quite certain that she did not.

5 Q) At the meeting, did Ms. E say Z?

6 A) Yes, I think she did.

\*37 7 8 9 10 11 Q) I have talked to Ms. B on this subject, and she said that the three of you stopped for tea on your way back to the office and that E said Z jokingly at the tea shop, not at the meeting. Does that refresh your memory about where E said Z?

12 A) Yes, now I remember; E said Z at the tea shop, not at the meeting.

The ethical propriety of lawyer L's conduct in Example Nine depends on what she intends in lines 7 -11. If L thinks that A's statement on line 6 is the product of a failed memory, and if L is making a good faith effort on lines 7 - 11 to refresh A's memory, then L's conduct is not unethical. (However, it is argued below that L ought to use a more delicate method of refreshing A's memory. [\[FN111\]](#))

On the other hand, suppose L thinks that A's memory of the meeting is as fresh as it will ever be, and that the statement on line 6 clearly and completely reflects what A believes. If that is true, and if L's intent in lines 7 -11 is to flout the maxim of relevance and thus to signal A to adopt B's tea shop story, then L's conduct is unethical.

#### IV. Grade Three Witness Coaching

Grade Three witness coaching is where the lawyer does not knowingly induce the witness to testify to something the lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story. Unlike Grades One and Two, Grade Three witness coaching is not grounds for lawyer discipline or criminal prosecution for subornation of perjury. [\[FN112\]](#) Grade Three witness coaching lacks the element of corruption that Grades One and Two have. It does, however, alter the witness's story, and can thus interfere with the court's truth-seeking function.

##### A. The Problem

Part I.C. of this Article presents the conclusions of psychologists who study human memory. They conclude that human memory is highly malleable, that a small difference in the content of an interviewer's questions can make a big difference in the witness's \*38 story, and that new information incorporated into an interviewer's questions can mislead a witness into remembering things that he did not perceive. [\[FN113\]](#) If those psychologists are right, then the quality of testimony is at risk when even the most ethical and prudent lawyer interviews and prepares a witness.

In counterpoint, Part I.D. argues that the adversary system benefits from allowing lawyers to interview witnesses and to prepare them to testify. [\[FN114\]](#) Part I.E. then sets out a long (and doubtless incomplete) list of legitimate reasons for a lawyer to ask a particular question or to make a particular statement when interviewing and preparing a witness. [\[FN115\]](#) What is needed now is a method of analysis that will give a lawyer reasonable latitude when interviewing and preparing a witness, yet will minimize the risk to the quality of the witness's testimony. [\[FN116\]](#)

##### B. A Proposed Method of Analysis

The method of analysis proposed below covers all three grades of witness coaching. A lawyer can use the following steps to test the propriety of her next question or statement in an interview or preparation session with a witness:

Step One: Will my next question or statement overtly tell this witness that I want him to testify to something I

know is false? If so, I could be disciplined or criminally sanctioned. If not, then --

**\*39** Step Two: Will my next question or statement send a covert message to this witness that I want him to testify to something I know is false? If so, I could be disciplined or criminally sanctioned. If not, then --

Step Three: Is there a legitimate reason for my next question or statement to this witness? [\[FN117\]](#) If there is no legitimate reason, then I should not ask the question or make the statement. If there is a legitimate reason, then --

Step Four: Am I asking the question or making the statement in the manner that is least likely to harm the quality of the witness's testimony? If not, then I should change my approach.

#### Example Ten

To illustrate how the proposed method of analysis works, let us return to Example Nine. In this example, lawyer L is interviewing Ms. E's assistant, Mr. A, to find out what Ms. E said at the meeting. You will recall that lawyer L has already interviewed E's other assistant, Ms. B, who said that after the meeting E, A, and B stopped at a tea shop, that E was in a jovial mood, and that E said Z as a joke at the tea shop, not at the meeting. For convenience's sake, the critical part of L's interview with A is reproduced here, unchanged from Example Nine:

1 Q) At the meeting, did Ms. E say X?

2 A) No, I am quite certain she didn't.

3 Q) Did she say Y at the meeting?

4 A) Again, I am quite certain that she did not.

5 Q) At the meeting, did Ms. E say Z?

6 A) Yes, I think she did.

7 8 9 10 11 Q) I have talked to Ms. B on this subject, and she said that the three of you stopped for tea on your way back to the office and that E said Z jokingly at the tea shop, not at the meeting. Does that refresh your memory about where E said Z?

12 13 A) Yes, now I remember; E said Z at the tea shop, not at the meeting.

In Example Nine, we concluded that L would be acting unethically if she thinks that A's memory of the meeting is fresh and that the statement on line 6 clearly and completely reflects what A believes, and if L intends in lines 7 - 11 to signal A to abandon line 6 and to adopt the tea shop story in its place.

Now let us make the opposite assumption about L's intent. Suppose L thinks that A's statement on line 6 is the product of a **\*40** failed memory, and suppose that L intends lines 7 -11 as a good faith effort to refresh A's memory about the tea shop -- rather like the lime tea and madeleines that refreshed Proust's memory of things past. [\[FN118\]](#)

Lawyer L is not engaged in either Grade One or Grade Two witness coaching, and she therefore glides past Steps One and Two of the proposed method of analysis. Step Three requires lawyer L to pause before lines 7 -11 and to ask herself whether there is a legitimate reason for what she is about to say. What is she trying to accomplish? By the hypothesis, she is hoping to refresh A's memory that Ms. E said Z in jest at the tea shop, not in earnest

at the meeting. Refreshing memory is certainly one of a lawyer's legitimate functions when interviewing and preparing a witness. [\[FN119\]](#) Therefore L passes Step Three and can move to Step Four.

At Step Four, she founders. Lines 7 -11 completely disclose the tea shop story. Did the disclosure really bring back A's own memory of sitting at the tea shop and hearing Ms. E say Z as a joke? Or, is A adopting Ms. B's story because he thinks B's memory about such things is usually more accurate than his own? Or, is A adopting B's story because he fears for his future at D Company if he contradicts B and gets his boss E in trouble? Lawyer L's heavy-handed method of refreshing A's memory has made those questions impossible to answer, casting doubt on A's sincerity.

How could L have tried to refresh A's memory with less risk to the quality of A's testimony? Here is one possible approach, not necessarily the best one. Instead of revealing B's entire tea shop story at the outset, L could have tried successive questions that reveal one bit at a time, taking care not to reveal any more than is needed to refresh A's memory. [\[FN120\]](#) The string of questions might begin something like this:

**\*41**

1 Q) What happened after the meeting?

2 A) I went back to the office.

3 Q) Did anybody go back with you?

4 A) Yes, E, B, and I walked back together.

5 Q) Did anything happen on the way?

6 A) I don't recall anything specific.

7 Q) Did you stop anywhere?

8 91 A) Oh, yea, we stopped at that little tea shop on 4th Street for a cup of tea.

10 Q) What kind of mood was E in after the meeting?

What if L pursues this series of questions to the end, but A still makes no mention of E saying Z at the tea shop? At that point, but not earlier, L would be justified in fully revealing to A what he learned from B:

1 2 Q) When Ms. E was joking around at the tea shop, what was she joking about?

3 A) I don't remember -- just joking I guess.

4 Q) Was she joking about the meeting?

5 A) Probably, but I don't recall anything specific.

6 7 Q) Did she jokingly make a statement that would have caused a disaster at the meeting?

8 A) Maybe. She does have a twisted sense of humor.

9 Q) Did she say Z at the tea shop?

10 A) Yes, she did!

11 Q) Why was that a joke?

12 13 14 A) Because it would have been a horrible thing to say in front of P's people at the meeting. I remember now; she said Z at the tea shop, not at the meeting.

### C. Non-Suggestive Interviewing

How can a lawyer get past Step Four of the proposed method of analysis when interviewing a problem witness - for example, a witness who perceived but has now forgotten; a witness who perceived but is now mistaken; or a witness who perceived and remembers but is now quaking with uncertainty? Some lawyers resort too quickly to the old, tried and true remedies: help the witness along with some leading questions; show the witness a document that spells it out; tell the witness what some other witnesses said about the same event; motivate the witness with a lecture about the consequences of saying one thing or another. Those \*42 remedies are indeed old and tried, but not necessarily true. All of them are suggestive, and, if the psychologists are right, they can contaminate the witness's evidence. [\[FN121\]](#)

The psychologists have some recommendations that can reduce lawyers' need for the old remedies. Their recommendations must be prefaced, however, with a realistic warning from two experienced trial lawyers: every witness is different, and "[n]o one method works successfully with all witnesses." [\[FN122\]](#)

#### 1. Recall First, Then Recognition

Suppose that a witness observes some detailed event such as a car crash or a price-fixing meeting. If she is later asked to state all the details she can remember about it, she might come up with only forty-five percent of the details, but she will be quite accurate about the ones she remembers. [\[FN123\]](#) Psychologists call that kind of remembering "recall." [\[FN124\]](#) If, instead, she were given a series of specific questions asking whether she saw this or that detail, she might be able to answer sixty-five percent of the questions with confidence, but her accuracy rate would be lower. [\[FN125\]](#) Psychologists call that kind of remembering "recognition." [\[FN126\]](#) Recognition produces more details but less accuracy; recall produces more accuracy but fewer details. A lawyer who needs both accuracy and details should therefore draw on both recall and recognition, and most psychologists recommend using recall first, then recognition. [\[FN127\]](#) That is, the lawyer should open the topic with a broad question that calls for a narrative answer. (For example, "Please tell me everything you can remember about the meeting that afternoon.") After the witness has recalled all that she can, the lawyer should then \*43 ask her some narrow, specific questions that draw on her power of recognition. (For example, "At the meeting, did anybody use the term 'cutthroat bidding'")

#### 2. Neutral Questions

Small differences in the wording of questions can make large differences in a witness's responses. One well-known study concerns the two articles "a" and "the." If a witness is asked, "Did you see the thin man in the blue suit?" he will be more likely to answer affirmatively than if he had been asked, "Did you see a thin man in a blue suit?" [\[FN128\]](#) One explanation is that "the" tips off the witness that the questioner thinks such a man was present, whereas "a" keeps the questioner in a more neutral position. [\[FN129\]](#)



In another study of wording differences, two equivalent groups of people were asked about headaches. One group was asked, “Do you get headaches frequently, and, if so, how often?” That group reported an average of 2.2 headaches per week. The second group was asked, “Do you get headaches occasionally, and, if so, how often?” That group reported an average of 0.7 headaches per week. [\[FN130\]](#)

Experiments of this sort suggest that a lawyer should use care in wording interview questions and should, where possible, use neutral words instead of words that reveal the lawyer's beliefs, value judgments, attitudes, desires, or expectations.

### 3. Ordering of Questions

Assume for the sake of argument that there is some kind of connection between the way we humans store information in memory and the way we retrieve it from memory. Assume also that a particular human stored some pieces of information in his memory according to pattern x“zy. Would it not be reasonable to suppose that our human will find it easier to retrieve that information from memory if he invokes pattern x“zy than if he invokes some different pattern, such as “zxy?

Psychologists Valerie and Peter Morris tested this hypothesis by showing a group of subjects a television clip in which the main \*44 event was an exciting chase scene. [\[FN131\]](#) Then each person wrote out a narrative account of what he or she had seen. After that, the people were divided into four groups, and the groups were asked a set of specific questions about what they had seen. All groups were asked the same questions, but the order of the questions differed. One group got their questions in time sequence, that is, the order in which the events happened in the television clip. The second group got theirs in random order. The third group received all the questions about the main characters at the beginning, with the rest of the questions in time sequence at the end. The fourth group got all the questions about the main event (the chase) at the beginning, with the rest in time sequence at the end. In the Morris study, the highest proportion of correct answers came from the time sequence group, with the main character group as a close second. [\[FN132\]](#) The Morris study suggested a conclusion that goes back to our original assumption and hypothesis that information is stored in some pattern, and that it can best be retrieved by following the same pattern:

The better recall in the time sequence and central character conditions probably results from these question orders tapping the organization of the information about the films in the memories of the subjects. These orders allow the films to be reconstructed so that information retrieved while answering one question is still active to cue recall of the next, related answer. [\[FN133\]](#)

When a lawyer starts interviewing a witness, the lawyer's mind is likely to be focused on the “main event,” meaning the nucleus of facts that the lawyer hopes this witness can supply. The Morris study suggests that the lawyer's point of focus may not be the best point around which to organize the witness interview. [\[FN134\]](#) The lawyer may do better to organize the interview on whatever pattern the witness is likely to have used when storing the information in memory. [\[FN135\]](#)

#### \*45 D. The Cognitive Interview

The three suggestions offered in the preceding section are only a small sample of the ideas proposed in the literature by psychologists and others who study memory and interviewing. The lawyer who really wants to learn how to coach less and learn more from witnesses should consider using a new, more comprehensive approach developed over the past dozen years by psychologists Edward Geiselman, Ronald Fisher, and their colleagues. They selected two main premises from the literature on cognition, [\[FN136\]](#) added some findings and ideas of their own, and came up with a package of interview techniques that they call the “cognitive interview.” [\[FN137\]](#)

## 1. The Original Cognitive Interview

As Geiselman and Fisher originally conceived it, the cognitive interview consisted of four simple techniques that were shown to help witnesses retrieve information from their memories. [\[FN138\]](#) The first two techniques are based on a premise that is well-known in cognitive theory: the effectiveness of a retrieval cue depends on its similarity to the conditions that existed when the witness acquired the memory. [\[FN139\]](#)

### Technique One: Reinstatement Context

A retrieval environment that is substantially similar to the environment at the time the witness perceived the event helps the witness to remember the event. [\[FN140\]](#) The witness need not return <sup>\*46</sup> physically to the scene; returning in one's mind is generally enough. [\[FN141\]](#) Thus, Geiselman and Fisher recommend giving the witness an instruction something like this: "First, try to reinstate in your mind the context surrounding the incident. Think about what the room looked like and where you were sitting in the room. Think about how you were feeling at the time and think about your reactions to the incident." [\[FN142\]](#)

### Technique Two: Tell Everything

A memory is not a single candid snapshot of an event; "it is a complex array of many features." [\[FN143\]](#) At a given time, some features are restricted and some are not. [\[FN144\]](#) Geiselman and Fisher urge witnesses to lower their standards for relevance and to report every scrap they can remember, even if it seems incomplete or irrelevant. The hope is that incomplete or irrelevant scraps might cue other material that could prove useful. [\[FN145\]](#)

The third and fourth techniques are based on another premise that is well-known in cognitive theory: there may be several retrieval paths to a particular piece of information, and when one retrieval cue does not work, a different one may. [\[FN146\]](#)

### Technique Three: Recall the Event in Different Orders

Consistent with the Morris study, discussed above, [\[FN147\]](#) this technique recognizes that information can be stored in memory according to a variety of patterns, and that one pattern of access may be more effective than others. Geiselman and Fisher recommend instructing the witness in the following manner:

Third, it is natural to go through the incident from beginning to end, and that is probably what you should do first. However, many people can come up with more information if they also go through the events in reverse order. Or, you might start with the thing that impressed you the most and then go from there, proceeding both forward and backward in time. [\[FN148\]](#)

### <sup>\*47</sup> Technique Four: Change Perspectives

The fourth technique likewise seeks to open a variety of retrieval paths. After the witness explains what she perceived from her perspective, she should be instructed something like this:

[Now] try to adopt the perspective of others who were present during the incident. For example, try to place yourself in [X's] role and think about what she must have seen. [\[FN149\]](#)

## 2. Results of the Original Cognitive Interview

Geiselman, Fisher and additional researchers have tested the original cognitive interview in many laboratory

experiments using various kinds of events (simulated crimes, non-criminal events, live role played events, familiar and unfamiliar events), using various kinds of witnesses (adults, children, students, non-students, Americans, Germans, and British), and using both written and oral witness reports. [\[FN150\]](#) In contrast to more conventional interviewing techniques, the original cognitive interview increases the witness's output of correct information by an average of twenty-five to thirty percent. [\[FN151\]](#)

### 3. The Present Version of the Cognitive Interview

The results of the original version of the cognitive interview were impressive but not perfect, and in 1987 Geiselman and Fisher published the present, revised version. [\[FN152\]](#) While the present version builds on the four basic memory enhancing techniques used in the original version, [\[FN153\]](#) it has been enhanced in two ways. First, the present version recommends a structure, a series of stages, that interviewers should use in a cognitive interview. Second, the present \*48 version includes dozens of practical suggestions for interviewers; some were gleaned from the literature of psychology and related fields, and others from Geiselman and Fisher's study of interview styles, interview tapes, and the like. [\[FN154\]](#) The improvements are discussed in the paragraphs below.

### 4. Recommended Structure of a Cognitive Interview

Geiselman and Fisher recommend that interviewers use the following five stages:

#### Introductory Stage

In the introductory stage, the interviewer should first seek to put the witness at ease. If the witness shows unusual stress, one way to do that is to begin with easy questions to get background information about the witness. [\[FN155\]](#) Next, the interviewer should seek to build rapport with the witness and should explain the witness's central role in the interview. [\[FN156\]](#) The witness plays the central role because the witness is the one who knows what the facts are! [\[FN157\]](#) In a cognitive interview (unlike many ordinary interviews), the witness should do most of the talking and hard thinking, [\[FN158\]](#) while the interviewer should be mostly listening, gently guiding, and probing when necessary. [\[FN159\]](#) Finally, the interviewer should explain to the witness the four basic memory enhancing techniques, and encourage their use during the interview. [\[FN160\]](#)

#### Open-Ended Narration Stage

In the open-ended narration stage, the interviewer asks the witness one or more broad, open-ended questions that are designed to elicit from the witness a narrative about the entire event. [\[FN161\]](#) For example, "Tell me in your own words whatever you can remember about the [meeting]. Tell me everything you can in as much detail as you can." [\[FN162\]](#) Despite the request for details, at this stage the interviewer should be listening, not for details, but \*49 for the overall pattern of the witness's memory about the event. [\[FN163\]](#) This is not an information gathering stage -- it is a planning stage, in which the interviewer should be designing the best way to probe the witness's memory. [\[FN164\]](#)

#### Probing Stage

The probing stage is the main information gathering stage of a cognitive interview. [\[FN165\]](#) The interviewer directs the witness's attention back to each significant topic the witness mentioned in the open-ended narration, patiently taking each topic separately and exhausting the witness's memory about that topic before moving on to the next. [\[FN166\]](#) The interviewer should begin each topic with an open-ended question that asks the witness to give a detailed narrative of everything the witness can remember about it. [\[FN167\]](#) For example, "You told me earlier that the thin man in the blue suit mentioned something about 'cutthroat bidding.' Tell me everything you remember about that, in as much detail as you can." The interviewer must not interrupt the witness's answer, and must not

move to a different topic until the witness's memory about the first topic is exhausted. [\[FN168\]](#) If the first open-ended question fails to produce the needed detail, the interviewer can follow up with a narrower but still open-ended question, such as, "Tell me what he said about 'cutthroat bidding.'" [\[FN169\]](#) If that does not work, the interviewer can resort to a closed-ended (leading) question, such as, "Did he say that 'cutthroat bidding' is bad for the industry?" [\[FN170\]](#)

#### Review Stage

In the review stage, the interviewer should repeat in the witness's presence all of the relevant pieces of information the witness has provided. [\[FN171\]](#) This has two purposes. First, it gives the witness and interviewer a chance to make sure the interviewer has understood correctly, and second, it gives the witness an additional chance to search for forgotten details. [\[FN172\]](#)

#### \*50 Closing Stage

In the closing stage, the interviewer should collect additional background information, such as the witness's phone number, and should urge the witness to get in touch when she remembers anything else about the event. [\[FN173\]](#) Finally, the interviewer should seek to leave the witness with a favorable last impression, bearing in mind that the interviewer may need to impose further on the witness and may also need the cooperation of the witness's family, friends, or associates. [\[FN174\]](#)

### 5. Practical Suggestions for Cognitive Interviews

The present version of the cognitive interview offers numerous practical suggestions for interviewers. Some are as follows:

The single most important skill an interviewer can learn is not to interrupt the witness in the middle of a narrative response. [\[FN175\]](#) When the witness says something worth pursuing, the interviewer should make a note of it and come back to it later. [\[FN176\]](#) Even if the witness pauses for several moments during the narrative, the interviewer should keep quiet, or perhaps use a gesture, to encourage the witness to continue. [\[FN177\]](#)

Some interviewers insist on demonstrating dominance during the interview. That can be a big mistake because the witness is the one holding all the memories. Compare these two interview approaches:

Mary, you're the only person who saw the crime. I didn't see it, so I'm depending on you to tell me what happened. Don't wait for me to ask you lots of questions. I'm expecting you to do most of the talking here. Now, try to tell me everything you can about what happened earlier today. [\[FN178\]](#) The second interviewer's approach was as follows:

INT: Can you give me a description of the subject?

E/W: He was a Latin boy, more or less 23 to 25 years old.

INT: How tall was he?

E/W: Let's say 5-foot 3 . . . And with a blue overcoat.

\*51 INT: Let me ask the questions and you give me the answers. [\[FN179\]](#)

During an interaction between two people, “each person's behavior will tend over time to resemble that of the other person.” [\[FN180\]](#) If the witness is doing something counterproductive, one way the interviewer can change that behavior without seeming obnoxious is to do what she wants the witness to do. [\[FN181\]](#) For example, if the witness is frantically talking at machine gun pace, the interviewer can slow him down by being calm, slow, and gentle. [\[FN182\]](#)

One of the four basic memory enhancing devices urges the witness not to edit out material that seems incomplete or irrelevant. Another urges the witness to consider the event from the perspectives of other people. Some witnesses misinterpret these suggestions as an invitation to guess or fabricate. [\[FN183\]](#) The interviewer should expressly caution the witness not to guess or fabricate. [\[FN184\]](#)

The interviewer should avoid skipping from topic to topic during the probing stage of the interview. How many times have we seen some television lawyer interviewing the witness in his office like this:

Q) How tall was he?

A) Oh, average, maybe six feet or so.

Q) What color car did you say he had?

A) Puce. It was a puce Cadillac coupe.

Q) Puce, eh. Any tatoos, scars, or other marks on his face or body? This interview style makes for fast-paced television, but it wastes the witness's mental effort. [\[FN185\]](#) It takes effort to summon up the mental image of the car. Instead of skipping to tatoos, scars and \*52 marks, a real life interviewer should stay with the car image until the witness cannot summon up any more about it. [\[FN186\]](#)

#### Conclusion

Judge Francis Finch of the New York Court of Appeals got it about right in 1880 when he wrote:

While a discrete and prudent attorney may very properly ascertain from witnesses in advance of the trial what they in fact do know, and the extent and limitations of their memory, as a guide for his own examinations, he has no right, legal or moral, to go further. His 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. [\[FN187\]](#) The rules of professional conduct and the subornation of perjury statutes can deal with the obvious scoundrels, but they are of little use against the more cunning lawyer who covertly invites a falsehood. Sadly, such covert invitations are not uncommon, and one of their unfortunate side effects is to teach other lawyers bad habits. Learning Paul Grice's theory of conversational implicature can help an honest lawyer spot a covert invitation for what it is. Once spotted, it can be avoided, and that is a task for the lawyer's own informed conscience.

Unintentional contamination of a witness's story is harder to avoid. This Article suggests that when interviewing and preparing a witness, a lawyer should continuously think about whether there is a legitimate purpose for the next question or the next statement. If there is, the lawyer should then make sure that the question is asked or the statement is made in the manner least likely to harm the quality of the witness's testimony. In closing, the Article suggests that Geiselman and Fisher's cognitive interview is worthy of study by lawyers who want to coach less and learn more from their witnesses.

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[FN1]. See D.C. Bar Legal Ethics Comm., Formal Op. 79 (1979) (“lawyers commonly, and quite properly, prepare witnesses for testimony”); Charles W. Wolfram, *Modern Legal Ethics* s 12.4.3, at 647- 48 (1986) (“Lawyer interviews with witnesses in preparation for testimony have become an accepted and standard practice in the United States”) (footnote omitted).

[FN2]. The ethical duty is part of the lawyer's general duty to represent the client competently. See Model Rules of Professional Conduct Rule 1.1 cmt. 5 (1995) (competent handling includes fact investigation) [hereinafter Model Rules ]; see also Model Code of Professional Responsibility DR 6 - 101(A)(2) (1981) (lawyer must not “[h]andle a legal matter without preparation adequate in the circumstances”) [hereinafter Model Code ]. The legal duty has several sources. One is the law of legal malpractice. See [Brizak v. Needle, 571 A.2d 975, 983 - 84 \(N.J. Super. Ct. App. Div. 1990\)](#); 2 Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* s 24.22 (3d ed. 1989) (failure to do adequate fact investigation can constitute legal malpractice). Another source is the rules of procedure. For example, in a federal civil case the lawyer must sign pleadings and similar court papers; the lawyer's signature is a pledge that the lawyer has made a reasonable inquiry into the facts and that the factual assertions or denials in the paper are warranted. See [Fed. R. Civ. P. 11](#).

[FN3]. See *infra* text accompanying notes 38 - 45; [State v. Earp, 571 A.2d 1227, 1234 -35 \(Md. 1990\)](#); [State v. McCormick, 259 S.E.2d 880 \(N.C. 1979\)](#), in which the Supreme Court of North Carolina said:

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 court time. [Id. at 882](#).

[FN4]. [In re Eldridge, 37 N.Y. 161, 171 \(N.Y. 1880\)](#).

[FN5]. Model Rules Rule 3.4(b) states that a lawyer must not “counsel or assist a witness to testify falsely,” and Model Rules Rule 3.3(a)(4) states that a lawyer must not “knowingly offer evidence that the lawyer knows to be false.” Similarly, Model Code DR 7-102(A)(4) states that a lawyer must not “[k]nowingly use perjured testimony or false evidence,” and Model Code DR 7-102(A)(6) states that a lawyer must not “[p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.” A lawyer can also be criminally punished for suborning perjury, that is, procuring or inducing a witness to commit perjury. See, e.g., [18 U.S.C. s 1622 \(1994\)](#). A witness commits perjury if: (a) he testifies under oath about a material matter; (b) his testimony is false; (c) he knows it is false; and (d) his testimony is voluntary and intentional, not a result of confusion, mistake, or faulty memory. Compare [18 U.S.C. s 1621 \(1994\)](#), with [United States v. Dunnigan, 113 S. Ct. 1111, 1116 \(1993\)](#), and [United States v. Swink, 21 F.3d 852, 857-59 \(8th Cir. 1994\)](#).

[FN6]. Such rules include the Model Rules and the Model Code.

[FN7]. See *infra* note 48.

[FN8]. For a discussion of Grice's theory in the context of perjury law, see Peter M. Tiersma, *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 *S. Cal. L. Rev.* 373 (1990).

[FN9]. This list is similar but not identical to one in the Restatement of the Law Governing Lawyers s 176 cmt. b



(Preliminary Draft No. 10, 1994). [[[ Caveat: The Preliminary Draft is just what the name implies -- an early working paper, not a finished product. At the time of its printing, the Preliminary Draft had not been considered by the Council or Membership of the American Law Institute, and it therefore does not represent the position of the Institute on any of the issues with which it deals.] The items listed in the text accompanying this note are discussed in articles and books that are designed to teach students and practicing lawyers how to prepare cases for trial. See, e.g., Ronald L. Carlson & Edward J. Imwinkelried, *Dynamics of Trial Practice: Problems and Materials* s 9.4 (2d ed. 1995); Roberto Aron & Jonathan L. Rosner, *How to Prepare Witnesses for Trial* (1985); W. Ted Minick, *Fixing the Truth*, in *ALI-ABA Course of Study: Lender Liability and Other Complex Litigation Involving Financial Institutions* (1994) (available in C880 ALI-ABA 509); James W. McElhaney, *Helping the Witness: Techniques for Keeping Witnesses out of Trouble*, *A.B.A. J.*, Aug. 1993, at 85; John P. DiBlasi, *Preparing Your Witness for Trial*, *N.Y. St. B.J.*, Dec. 1993, at 48; James W. McElhaney, *Trouble in the Woodshed*, *Litig.*, Winter 1989, at 49; James W. McElhaney, *Horse-Shedding the Witness: Techniques for Witness Preparation*, *Trial*, Oct. 1987, at 80 [hereinafter *McElhaney, Horse-Shedding*]; David H. Berg, *Preparing Witnesses*, *Litig.*, Winter 1987, at 13; Diane R. Follingstad, *Preparing the Witness for Courtroom Testimony: Modifying Negative Behavior Through Employment of Psychological Principles*, *Trial*, Jan. 1984, at 50; Joseph D. Piorkowski, Jr., Note, [Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching"](#), *1 Geo. J. Legal Ethics* 389 (1987).

[FN10]. The discussion in this section is based on R.J. Walker & Richard Ward, *Walker & Walker's English Legal System* 204 -30 (7th ed. 1994), and Michael Zander, *Cases and Materials on the English Legal System* 628 - 49, 651-69, 676 - 89 (6th ed. 1993), and on many interviews and conversations I had with English solicitors and barristers in 1994 - 95. See also Ethics Forum and Debate, [Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices](#), *7 Geo. J. Legal Ethics* 865 (1994) (discussing legal ethics and trial practices in England and America).

[FN11]. For comments on the practice in criminal cases, see *infra* note 39.

[FN12]. For the legal ethics rule that governs this activity, see *The Guide to the Professional Conduct of Solicitors* s 22.05 (Stephen Hammett et al. eds., 6th ed. 1993), which states: "It is permissible for a solicitor acting for any party to interview and take statements from any witness or prospective witness at any stage in the proceedings, whether or not that witness has been interviewed or called as a witness by another party." Commentary 2 to s 22.05 explains that "[a] solicitor must not, of course, tamper with the evidence of a witness or attempt to suborn the witness into changing evidence." *Id.* s 22.05 cmt. 2.

[FN13]. See list of techniques *supra* part I.A. With regard to rehearsal by role playing or otherwise, see *infra* notes 41- 45 and accompanying text.

[FN14]. See generally *Comfort Hotels Ltd. v. Wembley Stadium Ltd.*, 1 WLR 872 (Ch. 1987).

[FN15]. See R.S.C., Ord. 38, r. 2A, which can be found in the "White Book," 1 *The Supreme Court Practice: 1995* 647-53 (1994) [hereinafter *White Book* ].

[FN16]. See generally James Pyke, *Compulsory Exchange of Witness Statements*, *Solic. J.*, Apr. 16, 1993, at 350; Christopher R. McConnell, *Exchanging Witness Statements*, *Solic. J.*, Jan. 24, 1992, at 62.

[FN17]. *White Book*, *supra* note 15, at 651.

[FN18]. See *supra* note 16.

[FN19]. See Practice Direction, *Civil Litigation: Case Management*, 1 WLR 262 (Q.B. 1995) ("Unless otherwise ordered, every witness statement shall stand as the evidence in chief of the witness concerned."). This change was



one of several that were intended to save time and money in civil cases. Some barristers doubt the wisdom of the change. They believe that the witness's information has less impact when the judge reads it than when the judge sees the witness and hears the direct examination in the courtroom. Further, they believe the change consumes as much time as it saves because the cross-examiner has weeks to prepare and is inclined to cover minor points that previously would have been ignored. Some administrative tribunals in the United States also use written witness statements in lieu of, or in addition to, live testimony. See, e.g., [16 C.F.R. s 1502.32 \(1995\)](#) (rules for hearings before the Consumer Product Safety Commission); D.C. Bar Legal Ethics Comm., [Formal Op. 79 \(1979\)](#) (commenting on the ethics rules a lawyer should follow when preparing written witness statements for administrative tribunals).

[\[FN20\]](#). Barristers (not solicitors, mind you) are prohibited from “rehears [[[ing,] pract[icing,] or coach[ing] a witness in relation to his evidence or the way in which he should give it.” Code of Conduct of the Bar of England and Wales P 607(b) (1995) [hereinafter Code of Conduct ]. No such rule governs solicitors when they do ordinary solicitor work, such as interviewing and preparing a witness. See *The Guide to the Professional Conduct of Solicitors*, supra note 12, s 22.05. Sometimes, however, solicitors serve as courtroom advocates, and when they assume that role, they are bound by a rule that is identical to the rule for barristers. See *The Law Society's Code for Advocacy*, in *Law Society, Professional Standards Bulletin No. 10 P 6.5(b) (1993)*.

[\[FN21\]](#). Until it was amended in 1995, the Code of Conduct for barristers prohibited personal contact of that sort “[s]ave in exceptional circumstances.” See Code of Conduct of the Bar of England and Wales PP 607.1-.3 (1991); id. at Annex H, P 6 (1994). I searched for and could not find a clear expression of the policy reasons for this ethics rule. Some barristers say that it was to help keep testimony pure, and others say it was to help maintain the division of litigation tasks between solicitors and barristers.

[\[FN22\]](#). See Code of Conduct, supra note 20, P 607(b).

[\[FN23\]](#). See id. Annex H, PP 6.1-.3.

[\[FN24\]](#). See id. P 6.2.2.

[\[FN25\]](#). See id. PP 6.2.1, 6.2.3 -.5.

[\[FN26\]](#). See Monroe H. Freedman, *Lawyers' Ethics in an Adversary System* 64 - 68 (1975); Monroe H. Freedman, *Understanding Lawyers' Ethics* 152-56 (1990) [hereinafter Freedman, *Understanding Lawyers' Ethics* ]; John S. Applegate, [Witness Preparation](#), 68 *Tex. L. Rev.* 277, 328 -34 (1989).

[\[FN27\]](#). See Freedman, *Understanding Lawyers' Ethics*, supra note 26, at 331; see also Elizabeth F. Loftus & James M. Doyle, *Eyewitness Testimony: Civil and Criminal* s 2.02 (The Michie Company, 2d ed. 1992) (1987).

[\[FN28\]](#). Freedman, *Understanding Lawyers' Ethics*, supra note 26, at 152.

[\[FN29\]](#). Id. at 152-53; Applegate, supra note 26, at 330 -31. See generally Paul C. Giannelli & Edward J. Imwinkelried, *Scientific Evidence* s 9 - 2 (2d ed. 1993).

[\[FN30\]](#). See Applegate, supra note 26, at 331; see also Loftus & Doyle, supra note 27, ss 3.06 -.08.

[\[FN31\]](#). See Freedman, *Understanding Lawyers' Ethics*, supra note 26, at 153 -54; Applegate, supra note 26, at 332.

[\[FN32\]](#). Freedman, *Understanding Lawyers' Ethics*, supra note 26, at 155; Applegate, supra note 26, at 333. This well-known example is based on an experiment described by Elizabeth Loftus and John Palmer. Elizabeth F. Loftus

& John C. Palmer, Reconstruction of Automobile Destruction: An Example of the Interaction Between Language and Memory, 13 *J. Verbal Learning & Verbal Behavior* 585 (1974).

[FN33]. One of the classic studies is reported in Elizabeth F. Loftus et al., Semantic Integration of Verbal Information into a Visual Memory, 4 *J. Experimental Psychol.: Hum. Learning & Memory* 19 (1978); see also Kenneth R. Weingardt et al., Misinformation Revisited: New Evidence on the Suggestibility of Memory, 23 *Memory & Cognition* 72 (1995).

[FN34]. In the 1970s, Elizabeth F. Loftus and her colleagues at the University of Washington performed experiments in which people saw an event and were later exposed to new, misleading information about it. When they were later asked what they had seen, they were frequently wrong, reporting the new, misleading information instead of what they had seen. See, e.g., Loftus et al., supra note 33, at 29 -31; Philip S. Dale et al., The Influence of the Form of the Question on the Eyewitness Testimony of Preschool Children, 7 *J. Psycholinguistic Res.* 269 (1978); Elizabeth F. Loftus, Leading Questions and the Eyewitness Report, 7 *Cognitive Psychol.* 560 (1975). Professor Loftus proposed a theory that the new, misleading information “overwrites” or destroys the original memories with which it conflicts. *Id.* at 570 -71. In the early 1980s, the Loftus theory was challenged by other researchers who suggested that the new, misleading information does not destroy the original memory but just makes it harder to retrieve. See D.A. Bekerian & J.M. Bowers, Eyewitness Testimony: Were We Misled?, 9 *J. Experimental Psychol.: Learning, Memory, & Cognition* 139 (1983). In the mid-1980s, a different research team made a more serious attack: they argued that the Loftus theory is based on flawed testing procedures and that new, misleading information does not impair the original memory or the ability to retrieve it. Using different testing procedures, they concluded that the new, misleading information affects the reports of only those subjects who failed to notice the original detail or who noticed it but had forgotten it by the time they were exposed to the new, misleading information. Compare Michael McCloskey & Maria Zaragoza, Misleading Postevent Information and Memory for Events: Arguments and Evidence Against Memory Impairment Hypotheses, 114 *J. Experimental Psychol.: Gen.* 1 (1985), and Michael McCloskey & Maria Zaragoza, Postevent Information and Memory: Reply to Loftus, Schooler, and Wagenaar, 114 *J. Experimental Psychol.: Gen.* 381 (1985), with Elizabeth F. Loftus et al., The Fate of Memory: Comment on McCloskey and Zaragoza, 114 *J. Experimental Psychol.: Gen.* 375 (1985). In the years since 1985, further experiments have countless times reconfirmed the basic phenomenon: all of the researchers in the field agree that (whatever the cause and mechanics) the accuracy of a person’s story about an event can be severely compromised by exposing the person to new, misleading information. See Maria S. Zaragoza & Sean M. Lane, Source Misattributions and the Suggestibility of Eyewitness Memory, 20 *J. Experimental Psychol.: Learning, Memory, & Cognition* 934 (1994); Robert F. Belli et al., Memory Impairment and Source Misattribution in Postevent Misinformation Experiments with Short Retention Intervals, 22 *Memory & Cognition* 40 (1994); Robert F. Belli, Influences of Misleading Postevent Information: Misinformation Interference and Acceptance, 118 *J. Experimental Psychol.: Gen.* 72 (1989); Barbara Tversky & Michael Tuchin, Comment, A Reconciliation of the Evidence on Eyewitness Testimony: Comments on McCloskey and Zaragoza, 118 *J. Experimental Psychol.: Gen.* 86 (1989); Elizabeth F. Loftus & Hunter G. Hoffman, Misinformation and Memory: The Creation of New Memories, 118 *J. Experimental Psychol.: Gen.* 100 (1989). Further, the current work in the field provides strong evidence that at least some of the misled persons sincerely believe that they saw things that, in reality, were only suggested to them. See Weingardt et al., supra note 33; Zaragoza & Lane, supra; D. Stephen Lindsay, Eyewitness Suggestibility, 2 *Current Directions in Psychol. Sci.*, June 1993, at 86.

[FN35]. Zaragoza and Lane concede that “[i]t is now well established that the accuracy of eyewitness testimony can be severely compromised by exposure to misleading postevent suggestion,” and that “[w]hether [or not] exposure to suggestion impairs the original memory, the fact remains that subjects can be easily led to report misinformation that has been suggested to them.” Zaragoza & Lane, supra note 34, at 934.

[FN36]. I am indebted for this illustration to Michael Sherrard, Q.C., of Middle Temple, London. See also Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 86 (Princeton Univ. Press 1950) (1949). Frank explains that

[i]f the witness desires to have the lawyer's client win the case, he will often, unconsciously, mold his story accordingly. Telling and re-telling it to the lawyer, he will honestly believe that his story, as he narrates it in court, is true, although it importantly deviates from what he originally believed. Id.

[\[FN37\]](#). See generally Deborah L. Rhode, Professional Responsibility: Ethics by the Pervasive Method 181- 90 (1994). In this article, I am assuming that a judicial trial in our adversary system is in part a search for the truth, rather than merely a way to resolve a dispute between people without having them fight it out in the streets. I am using “truth” and “true” to mean “in accordance with fact or reality.” See Webster's Third New International Dictionary of the English Language, Unabridged 2455 (Merriam-Webster Inc. 1986). I am using “falsity” and “false” to mean the opposite: “not in accordance with fact or reality.” See Sissela Bok, Lying: Moral Choice in Public and Private Life 6 -13 (1978) (distinguishing epistemological “truth” from ethical “truthfulness”).

[\[FN38\]](#). In contrast to our adversary system is the civil law system used in some European, Latin American, and Asian nations. The major differences are explained in Rudolf B. Schlesinger et al., Comparative Law 339 -525 (5th ed. 1988). In a civil law nation, the lawyers in non-criminal litigation generally do not have contact with witnesses before they testify. Id. at 422-23. Courts in civil law nations take a larger role than our courts in framing the legal and factual issues and in developing the evidence. Id. at 415 - 43. In our system, the parties and their lawyers develop the evidence to support their respective fact allegations, but in civil law nations that task falls initially on the parties and subsequently on the tribunal. Id. at 420 -23. In Germany, for example, the lawyers in non-criminal cases generally keep their distance from their own client's witnesses, not because of a formal ethics rule, but because the tribunal is more likely to believe a witness who has not discussed the case with the lawyer. (I am grateful to Professor Brunhilde Steckler of Bielefeld, Germany, for explaining this point to me.) For a vigorous exchange of views concerning the German system, compare John H. Langbein, [The German Advantage in Civil Procedure](#), 52 *U. Chi. L. Rev.* 823, 833 -35 (1985), and John H. Langbein, [Trashing the German Advantage](#), 82 *Nw. U. L. Rev.* 763, 766 -70 (1988), with Ronald J. Allen et al., [The German Advantage in Civil Procedure: A Plea for More Details and Fewer Generalities in Comparative Scholarship](#), 82 *Nw. U. L. Rev.* 705, 716 -25 (1988), and Ronald J. Allen, [Idealization and Caricature in Comparative Scholarship](#), 82 *Nw. U. L. Rev.* 785, 787- 92 (1988); see also Rhode, *supra* note 37, at 196 - 98.

[\[FN39\]](#). Helping the witness feel at ease is no small matter. The traditional practice in English criminal cases is instructive. Traditionally, prosecution witnesses have been interviewed and prepared by police officers or by solicitors from the Crown Prosecution Service, and defense witnesses have been interviewed and prepared by the defense solicitors. The non-party lay witnesses typically have never even met the barristers who will question them in the courtroom. When these witnesses arrive at the courthouse and are waiting to testify, they have traditionally been shunned, not just by the barristers but by everyone else connected with the case, for fear that any contact might create an appearance of impropriety. As a consequence, these witnesses (especially victim witnesses) typically have felt isolated, uncertain, and angry. See Paul Rock, *The Social World of an English Crown Court: Witness and Professionals in the Crown Court Centre at Wood Green* 40 - 48, 85 - 89, 110 -11, 127 (1993); see also *The Royal Commission on Criminal Justice, Report PP 47-52* (1993). In 1995, the General Council of the Bar approved a new practice standard that encourages barristers in both civil and criminal cases to be cordial to witnesses, to explain the process of giving evidence, and to answer witnesses' questions about court procedures. See Code of Conduct, *supra* note 20, P 6.1.4. The standard goes on to state that “[i]t is a responsibility of a barrister, especially when the witness is nervous, vulnerable or apparently the victim of criminal or similar conduct, to ensure that those facing unfamiliar court procedures are put as much at ease as possible.” Id.

[\[FN40\]](#). Evidence law requires the testimony of a witness to be based, not on guess or speculation, but on personal knowledge. [Fed. R. Evid. 602](#). Personal knowledge means that the witness perceived the events in question with his or her own senses. See [Fed. R. Evid. 602](#) advisory committee's note; [Cal. Evid. Code s 702](#) law revision commission comment (West 1995) (“ ‘Personal knowledge’ means a present recollection of an impression derived from the exercise of the witness' own senses.”). The advice to listen to questions carefully and not to volunteer information is based on the elementary principle that the trier of fact should not be exposed to evidence that is irrelevant, or that offends one of the exclusionary rules (such as the hearsay rule or the various privilege rules), or that may be too con-

fusing, too time consuming, or too prejudicial. See [Fed. R. Evid. 402-03](#). A witness who does not listen carefully or who blurts out information that was not called for may frustrate the efforts of the lawyers and the judge to follow the rules of evidence. For a skeptical view of the advice not to volunteer, see Marvin E. Frankel, *Partisan Justice* 14-16 (1980).

[FN41]. See, e.g., McElhaney, *Horse-Shedding*, *supra* note 9, at 83; Berg, *supra* note 9, at 15.

[FN42]. See, e.g., *Witness Grilled on Blood Vial*, *Int'l Herald Trib.*, Apr. 28, 1995, at 3 (concerning the cross-examination of a prosecution witness in the O.J. Simpson case).

[FN43]. Applegate, *supra* note 26, at 342-43.

[FN44]. See the usage of the term in McElhaney, *Horse-Shedding*, *supra* note 9, at 82-83.

[FN45]. Some authors recommend that when role playing, the lawyer should not put the questions in the same order nor use the same wording she will use at trial. They suggest that this technique helps keep the courtroom testimony from sounding “canned.” See Carlson & Imwinkelried, *supra* note 9, s 9.4, at 182; McElhaney, *Horse-Shedding*, *supra* note 9, at 83 (“It is much better for there to be a little awkward spontaneity than the impression that everything is canned.”). The text accompanying note 20, *supra*, observes that some solicitors in England regard role playing as ethically suspect. Some of the solicitors who favor role playing recommend using a set of facts other than those at issue in the case. For example, the solicitor and witness may have mutual knowledge of some unrelated transaction that can be used for role playing. Using an unrelated set of facts makes it clear that the lawyer is not trying to tamper with the evidence in the case.

[FN46]. The conduct is usually verbal, but it could be physical conduct that the lawyer intends as a substitute for words. Cf. [Fed. R. Evid. 801\(a\)](#) (for purposes of the hearsay rule, a “statement” includes nonverbal conduct if the actor intends it to be an assertion). For example, suppose that after a witness gives a harmful answer in an interview session, the lawyer blatantly glowers in silence, intending to signal the witness to back off and find a better answer.

[FN47]. See Model Rules Rule 3.4(b) (lawyer must not “counsel or assist a witness to testify falsely”). If the lawyer actually offers the testimony knowing it is false, then Model Rules Rule 3.3(a)(4) applies (lawyer must not offer evidence he knows is false). Accord Model Code DR 7-102(A)(4) (lawyer must not “[k]nowingly use perjured testimony or false evidence”); Model Code DR 7-102(A)(6) (lawyer must not “[p]articipate in the creation or preservation of evidence when he knows or it is obvious that it is false”).

[FN48]. Under the federal perjury statutes, a lawyer can be punished for suborning perjury if the following conditions are met: (a) the witness testified under oath or affirmation about a material matter; (b) the testimony was false; (c) the witness knew it was false; (d) the lawyer induced the witness to give the testimony; (e) the lawyer knew it was false; and (f) the lawyer knew that the witness knew it was false. See [Boren v. United States](#), 144 F. 801 (9th Cir. 1906); see also [United States v. Standifer](#), 40 M.J. 440, 442 (C.M.A. 1994); Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 525 (3d ed. 1982). For the elements of perjury itself, see [United States v. Dunnigan](#), 113 S. Ct. 1111, 1116 (1993); [United States v. Swink](#), 21 F.3d 852, 857-58 (8th Cir. 1994).

[FN49]. The Terminology section of the Model Rules states: “ ‘Knowingly,’ ‘known,’ or ‘knows’ denotes actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” Model Rules Terminology section.

[FN50]. The phrase “practically certain” comes from the Model Penal Code’s definition of “knowingly.” One acts knowingly to cause a result if “he is aware that it is practically certain that his conduct will cause such a result.” [Model Penal Code s 2.02\(2\)\(b\)\(ii\)](#) (Proposed Official Draft 1962).

[\[FN51\]](#). See supra note 49 ( Model Rules definition).

[\[FN52\]](#). 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct* s 402, at lxxvii (2d ed. Supp. 1994).

[\[FN53\]](#). Concerning rabbits and hats, see John D. Ayer, *So Near to Cleveland, So Far from God: An Essay on the Ethnography of Bankruptcy*, 61 *U. Cin. L. Rev.* 407, 434 n.102 (1992).

[\[FN54\]](#). If we continue the story in Example One and assume that at trial L offers W's testimony that the distance was less than 100 yards, L will be subject to professional discipline under Model Rules Rule 3.3(a)(4), which prohibits a lawyer from knowingly offering evidence she knows is false. We cannot tell whether L could also be criminally punished for suborning perjury because a key fact is missing: we have made no assumption about what W really believes about the distance. Perhaps he is a poor judge of distance and really believes that the distance was less than 100 yards. In that case, W would not be guilty of perjury because one element of perjury is that the witness testifies to something that he knows is false. See, e.g., [United States v. Swink](#), 21 F.3d 852, 857 (8th Cir. 1994). Similarly, L would not be guilty of suborning perjury, because one element of that offense is that the suborner knows that the witness does not believe what he says under oath. [Boren v. United States](#), 144 F. 801 (9th Cir. 1906).

[\[FN55\]](#). In Example Two, L would be subject to discipline under Model Rules Rule 3.3(a)(4) for offering testimony she knows is false. W could be criminally punished for perjury because (a) he testified falsely about what he believed, and (b) he knew his testimony was false. See supra note 5. Further, L could be criminally punished for suborning perjury because (a) L knew that W's testimony was a false statement about what he believed, and (b) L knew that W knew it was false. See supra note 48.

[\[FN56\]](#). See Restatement of the Law Governing Lawyers, supra note 9, s 180 cmt. d. [ Caveat: Again, be aware that the Preliminary Draft is an early working paper, not a finished product. At the time of its printing, the Preliminary Draft had not been considered by the Council or Membership of the American Law Institute, and it therefore does not represent the position of the Institute on any of the issues with which it deals.] Comment d states that “[a] lawyer's knowing offer of false testimony includes offering testimony that a lawyer knows to be false as well as offering testimony elicited from a witness who the lawyer knows has no recollected factual foundation but is only guessing or reciting what the witness has been instructed to say.” Id.

[\[FN57\]](#). The disciplinary and criminal law consequences of Example Three would be the same as Example Two, as explained in supra note 55.

[\[FN58\]](#). See supra notes 5 and 48.

[\[FN59\]](#). See Applegate, supra note 26, at 279.

[\[FN60\]](#). See Restatement of the Law Governing Lawyers ss 136, 141 (Tentative Draft No. 6, 1993); Restatement of the Law Governing Lawyers ss 137-40, 142- 43 (Tentative Draft No. 5, 1992).

[\[FN61\]](#). See Restatement of the Law Governing Lawyers ss 118 -35 (Tentative Draft No. 2, 1989).

[\[FN62\]](#). See Applegate, supra note 26, at 289 - 92.

[\[FN63\]](#). An ominous 1995 study in England concluded that only about one out of four people believes that courts in civil cases “usually get[ ] the judgment right.” Moira Bovill, National Consumer Council, *Civil Law and the Public*

Rep. No. 94/191 (1995). This same BBC survey concluded that among people who had recent experience with a civil dispute, only fourteen percent would prefer to have their next dispute resolved by a full court trial. *Id.* at iv. In contrast, twenty-seven percent would prefer “sitting [a]round a table with an independent expert to make the decision,” and forty-seven percent would prefer using an independent expert who “helps you to reach agreement between yourselves.” *Id.*

[FN64]. See, e.g., Thomas L. Shaffer & Robert F. Cochran, Jr., *Lawyers, Clients, and Moral Responsibility* 82- 92 (1994) (discussing truthfulness as a virtue to be nurtured in the attorney-client relationship).

[FN65]. Bok, *supra* note 37, at 23 -28.

[FN66]. *Id.* at 23.

[FN67]. *Id.* at 24.

[FN68]. *Id.*

[FN69]. *Id.* at 25 (footnote omitted).

[FN70]. See *id.* at 25 -26.

[FN71]. Professor Bok cites a ninth century source recommending four years of penance for one who makes a false oath, but seven years for one who induces it. *Id.* at 160 n.14 (quoting John T. McNeill & Helena M. Gamer, *Medieval Handbooks of Penance* 106 (1938)).

[FN72]. Paraphrasing Lord Coke, Thomas Wood explained that under the perjury statute of Elizabeth the First's time, “[a] greater Penalty is inflicted on Subornation of Perjury than on the perjury itself. For the author sins more than the actor.” Thomas Wood, *An Institute of the Laws of England* 414 (Garland Publishing, Inc. 1979) (3d ed. 1724). See Edward Coke, *The Third Part of the Institutes of the Laws of England* 166 - 67 (Garland Publishing, Inc. 1979) (1628).

[FN73]. See *supra* text accompanying notes 49 -50.

[FN74]. See *supra* text accompanying notes 51-57.

[FN75]. Robert Traver, *Anatomy of a Murder* (1958). Robert Traver was the pen name of John D. Voelker, a Justice on the Michigan Supreme Court. The Lecture scene has been discussed in many legal ethics books. See, e.g., Deborah L. Rhode & David Luban, *Legal Ethics* 320 -21 (2d ed. 1995); Geoffrey C. Hazard et al., *The Law and Ethics of Lawyering* 443 - 44 (2d ed. 1994), Rhode, *supra* note 37, at 212; Freedman, *Understanding Lawyers' Ethics*, *supra* note 26, at 156 -58; Frankel, *supra* note 40, at 15.

[FN76]. See Traver, *supra* note 75, at 32.

[FN77]. *Id.*

[FN78]. *Id.* at 35 - 49.

[FN79]. *Id.* at 46 - 49.



[\[FN80\]](#). *Id.* at 35.

[\[FN81\]](#). *Id.*

[\[FN82\]](#). For a thoughtful discussion of face-saving and how it affects the forms of communication between a speaker and hearer, see Penelope Brown & Steven Levinson, *Universals in Language Usage: Politeness Phenomena*, in *Questions and Politeness: Strategies in Social Interaction* 56 (Esther N. Goody ed., 1978). For a summary of Brown and Levinson's argument, see Malcolm Coulthard, *An Introduction to Discourse Analysis* 50 -54 (2d ed. 1985). Especially for a lawyer, the risk of being perceived as dishonest is a serious threat to face. According to Brown and Levinson, the more serious the threat to face, the more likely the speaker will communicate "off record," meaning covertly, just as lawyer Biegler did when lecturing Manion about the law of murder. See Brown & Levinson, *supra*, at 76 - 89.

[\[FN83\]](#). See *supra* text accompanying notes 58 -72.

[\[FN84\]](#). Paul Grice, *Studies in the Way of Words* back cover (1989).

[\[FN85\]](#). *Id.* preface at i and back cover.

[\[FN86\]](#). *Id.* at 22-24 (revised version of the William James lectures and other works, prepared by Grice near the end of his life).

[\[FN87\]](#). "Pragmatics is the study of how language is used to communicate." Frank Parker & Kathryn Riley, *Linguistics for Non-Linguists: A Primer with Exercises* 11 (2d ed. 1994). It is concerned, in part, with mechanisms that allow a speaker to mean more than he says, or to mean something different from what he says. See Stephen C. Levinson, *Pragmatics* 26 -27 (1983). The field of linguistics has many other branches including semantics ("the study of the meaning of words, phrases, and sentences"), Parker & Riley, *supra*, at 37; syntax ("the study of the structure of phrases, clauses, and sentences"), *id.* at 59; morphology (the structure of words), *id.* at 91; phonology ("the study of the sound system of language"), *id.* at 113; neurolinguistics (how the brain processes language); language variation (regional, social, and stylistic differences in language), *id.* at 147; and language acquisition (how humans learn to speak and understand a language), *id.* at 189.

[\[FN88\]](#). See Grice, *supra* note 84, at 24 -25.

[\[FN89\]](#). *Id.* at 25.

[\[FN90\]](#). See David Mellinkoff, *Mellinkoff's Dictionary of American Legal Usage* 228 (1992).

[\[FN91\]](#). Grice, *supra* note 84, at 24 -25. The verb form of Grice's term of art is implicate, which he intended to cover a range of similar verbs such as imply, suggest, hint, and the like. *Id.*

[\[FN92\]](#). *Id.* at 26.

[\[FN93\]](#). *Id.*

[\[FN94\]](#). *Id.*

[\[FN95\]](#). *Id.*



[\[FN96\]](#). Id.

[\[FN97\]](#). Id. at 26 -27.

[\[FN98\]](#). See id. at 29.

[\[FN99\]](#). See id. at 30.

[\[FN100\]](#). See id. at 30 -31.

[\[FN101\]](#). See id.

[\[FN102\]](#). See id.

[\[FN103\]](#). It came to mind, however, because of Grice's similar example. Id. at 35.

[\[FN104\]](#). Grice's theory of conversational implicature has shortcomings. One is that Grice's list of maxims may be incomplete, leaving us to play without a full deck. See id. at 27-28. A second shortcoming is that Grice's theory does not tell us which of several possible messages the hearer should derive from the speaker's flouting of a maxim. For example, the statement, "It's cold in here," might be taken as a request to close the door, but it could also be taken as a request to open the door or as an invitation to come in from the blazing sun. See Coulthard, *supra* note 82, at 32. Neither of those two shortcomings exists in an alternative theory proposed in Dan Sperber & Deirdre Wilson, *Relevance: Communication and Cognition* (1986). Grice was never satisfied with his own efforts to explain the maxim of relevance. See Grice, *supra* note 84, at 27, 29 -30. Sperber and Wilson pondered his dissatisfaction and emerged with an elegant unified theory of human communication. In place of Grice's Cooperative Principle and assorted maxims, Sperber and Wilson substitute a single concept: relevance. See Diane Blakemore, *Understanding Utterances* 26 -27 (1992). Their special definition of relevance is functionally similar to the one used in modern evidence law. Compare Sperber & Wilson, *supra*, at 118 -23, with [Fed. R. Evid. 401](#) (evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). According to Sperber and Wilson, when I open my mouth to say something in a conversation with you, I am making you two promises. First, I am promising that what I am about to say will have some value to you. Second, I am promising to say it in such a way that its value to you will justify the effort you must expend to understand it. See Sperber & Wilson, *supra*, at 155 - 63. Those two promises will enable you to interpret correctly whatever I say. See id. at 172-254. You will grasp the hidden messages I send you as implicatures; you will fathom my ironic, sarcastic, and cryptic statements; you will appreciate my metaphors, and so forth. See id. For the present purpose of analyzing witness coaching, Sperber and Wilson's theory produces the same results as Grice's, and this article uses only Grice's, simply to avoid having too many balls in the air.

[\[FN105\]](#). See [Fed. R. Evid. 602](#).

[\[FN106\]](#). See the discussion of the known false testimony element, *supra* text accompanying notes 51-57.

[\[FN107\]](#). Remember that the requirement of known falsehood can be met in two different ways. See *supra* text accompanying notes 56 -57. First, the lawyer may know that the statement is a false rendition of the events in question. Second, the lawyer may know that the statement is a false rendition of what the witness believes about the events in question. In Example Seven, lawyer L does not know what was said at the meeting, but lines 6- 7 tell her what A believes on that subject.

[FN108]. See Levinson, *supra* note 87, at 162- 63 (discussing hedge words such as well, anyway, actually, and after all).

[FN109]. See *supra* text accompanying notes 75 - 81.

[FN110]. On the “knowing inducement” element, L would argue that she did not realize that an innocent lecture on agency law would induce A to lie. See *supra* text accompanying notes 49 -50. On the “known falsehood” element, L would argue that she herself did not know what was said at the meeting, and that A's statement on lines 6-8 was too ambiguous to reveal A's belief about what was said at the meeting. See *supra* text accompanying notes 51-57. (Note, however, that if L really thought A's statement on lines 6-8 was ambiguous, L should have questioned A further to clear up the ambiguous statement rather than trying to suppress it.)

[FN111]. See *infra* part IV.B.

[FN112]. By definition, Grade Three witness coaching does not involve knowing inducement of testimony the lawyer knows is false. It therefore does not violate Model Rules Rule 3.3(a)(4) or 3.4(b), nor does it violate subornation of perjury statutes such as [18 U.S.C. s 1622 \(1994\)](#).

[FN113]. See *supra* notes 26 -36 and accompanying text. Professor Loftus concluded one of her non-technical articles as follows:

Misleading information can turn a lie into memory's truth. It can cause people to believe that they saw things that never really existed, or that they saw things differently from the way things actually were. It can make people confident about these false memories and also, apparently, impair earlier recollections. When adopted, the newly created memories can be believed as strongly as genuine memories.... The implications of these findings for the legal field, for advertising, for political persuasion, and for clinical settings are far-reaching. Elizabeth F. Loftus, *When a Lie Becomes Memory's Truth: Memory Distortion after Exposure to Misinformation*, 1 *Current Directions in Psychol. Sci.*, Aug. 1992, at 121, 123.

[FN114]. See *supra* text accompanying notes 37- 45.

[FN115]. See *supra* part I.E.

[FN116]. I am using “quality of testimony” to mean the amount of true information a witness provides. Thus, quality drops if the ratio of true to false information drops. Further, quality drops if the true-false ratio stays the same but the total amount of information drops. Similarly, when studying interview methods, psychologists measure their results by the number of correct and incorrect answers a witness provides. See, e.g., Mona Mantwill et al., *Effects of the Cognitive Interview on the Recall of Familiar and Unfamiliar Events*, 80 *J. Applied Psychol.* 68 (1995); Karen J. Saywitz, et al., *Effects of Cognitive Interviewing and Practice on Children's Recall Performance*, 77 *J. Applied Psychol.* 744 (1992).

[FN117]. See *supra* part I.E. (supplying partial list of legitimate reasons).

[FN118]. See [Baker v. State, 371 A.2d 699 \(Md. Ct. Spec. App. 1977\)](#), for a tongue-in-cheek explanation of the venerable doctrine of refreshing memory, in which the court reminds us:

Marcel Proust, in his monumental epic *In Remembrance of Things Past*, sat, as a middle-aged man, sipping a cup of lime-flavored tea and eating a madeleine, a small French pastry. Through both media, two long-forgotten tastes from childhood were reawakened. By association, long forgotten memories from the same period of childhood came welling and surging back. Once those floodgates of recall were opened, seven volumes followed. [Id. at 705 n.11.](#)

For a less entertaining look at refreshing memory, see Christopher B. Mueller & Laird C. Kirkpatrick, *Modern Evidence: Doctrine and Practice* ss 6.23 -.26 (1995).

[FN119]. For the reasons why, see *supra* part I.D.

[FN120]. The trial judge can insist on the one-bit-at-a-time approach when a lawyer refreshes a witness's memory in open court. Mueller & Kirkpatrick, *supra* note 118, s 6.28, at 777, states that the judge may require the lawyer to “allude to the statement in a way that is specific enough to jog the memory of the witness but not so detailed that it exposes the substance of the statement at the outset.”

[FN121]. See *supra* text accompanying notes 26 -36.

[FN122]. F. Lee Bailey & Henry B. Rothblatt, *Investigation and Preparation of Criminal Cases* s 6:12, at 131 (2d ed. 1985).

[FN123]. See Elizabeth F. Loftus, *Eyewitness Testimony* 90 - 92 (1979).

[FN124]. Robert Ornstein, *Psychology: The Study of Human Experience* 338 (1985) (“Recall is the ability to summon up stored information in the absence of the actual event or object.”).

[FN125]. Loftus, *supra* note 123, at 90 - 93.

[FN126]. Ornstein, *supra* note 124, at 338 (“Recognition is the ability to correctly identify an object or event.”).

[FN127]. Loftus, *supra* note 123, at 92- 94. But see J.M. Bowers & D.A. Bekerian, *When Will Postevent Information Distort Eyewitness Testimony?*, 69 *J. Applied Psychol.* 466, 471-72 (1984) (recognition-then-recall produces results about as good as recall-then-recognition). Professor Loftus fears the recognition-then-recall approach because she believes that the witness's exposure to the detailed questions can taint the later narrative answer. See Elizabeth F. Loftus, et al., *Effects of Questioning Upon a Witness' Later Recollections*, 3 *J. Police Sci. & Admin.* 162 (1975).

[FN128]. See, e.g., Elizabeth F. Loftus & Guido Zanni, *Eyewitness Testimony: The Influence of the Wording of a Question*, 5 *Bull. Psychonomic Soc'y* 86 (1975); Bernard Muscio, *The Influence of the Form of a Question*, 8 *Brit. J. Psychol.* 351 (1915).

[FN129]. See Loftus, *supra* note 123, at 95 - 96.

[FN130]. See *id.* at 94 - 95; Elizabeth F. Loftus, *Leading Questions and the Eyewitness Report*, 7 *Cognitive Psychol.* 560, 561 (1975).

[FN131]. See Valerie Morris & Peter E. Morris, *The Influence of Question Order on Eyewitness Accuracy*, 76 *Brit. J. Psychol.* 365 (1985).

[FN132]. *Id.* at 368 - 69. The Morris study got the same results for two different television clips, which made them believe that the results were not unique to the clips used. *Id.* at 369 -70.

[FN133]. *Id.* at 370.

[FN134]. *Id.*

[FN135]. The Morris study does not point to the conclusion that time sequence or main character organization will be the best for every situation. Common sense suggests that different people observing the same event will use different patterns when storing the information in their memories. For example, suppose a class of third graders has

staged a play based on the tale of Little Red Riding Hood. They presented the play for their parents a few nights ago, and we are now interviewing some parents for a newspaper article about the play. Ruby wrote the script, and when we interview her father, we might do best to organize the questions in time sequence. Titus played the Wolf, and when we interview Titus's mother, we might do best to organize the questions around the Wolf's role. Dolores, Sean, and Rebecca built and painted all the scenery, and when we interview their parents, we might do best to organize the questions around the various stage sets. In a real life context, an interviewer may have no clue about which pattern will prove best, and that is good reason for trying several different patterns, as recommended in the following section on the Cognitive Interview.

[FN136]. The study of cognition includes the study of perception, memory, inference, language, and related mental activities. See Ronald P. Fisher & R. Edward Geiselman, *Memory-Enhancing Techniques for Investigative Interviewing: The Cognitive Interview* vii (1992); Sperber & Wilson, *supra* note 104, at 38 - 46.

[FN137]. Ronald P. Fisher et al., *Improving Eyewitness Testimony with the Cognitive Interview*, in *Adult Eyewitness Testimony: Current Trends and Developments* 245, 246, 250 -51 (David F. Ross et al. eds., 1994); see also generally Fisher & Geiselman, *supra* note 136.

[FN138]. See R. Edward Geiselman et al., *Enhancement of Eyewitness Memory: An Empirical Evaluation of the Cognitive Interview*, 12 *J. Police Sci. & Admin.* 74 (1984).

[FN139]. *Id.* at 79; see also Fisher et al., *supra* note 137, at 246 - 47.

[FN140]. Fisher et al., *supra* note 137, at 246 - 47.

[FN141]. Geiselman et al., *supra* note 138, at 75.

[FN142]. *Id.* at 76.

[FN143]. *Id.* at 75.

[FN144]. *Id.*

[FN145]. *Id.*

[FN146]. See Fisher et al., *supra* note 137, at 247.

[FN147]. See *supra* text accompanying notes 131-35.

[FN148]. Geiselman et al., *supra* note 138, at 76.

[FN149]. *Id.*

[FN150]. See Mantwill et al., *supra* note 116, at 69, 75 -76; Fisher et al., *supra* note 137, at 246 -50. See also, e.g., Saywitz et al., *supra* note 116; David P. MacKinnon et al., *Improving Eyewitness Recall for License Plates*, 4 *Applied Cognitive Psychol.* 129 (1990); R. Edward Geiselman & Jesus Padilla, *Cognitive Interviewing with Child Witnesses*, 16 *J. Police Sci. & Admin.* 236 (1988).

[FN151]. Compare Mantwill et al., *supra* note 116, at 69, with Fisher et al., *supra* note 137, at 248 -50. In some experiments with the original version of the cognitive interview, researchers observed that the amount of incorrect

information also increased, but in only one case was the increase statistically significant. *Id.* For a critical look at the theoretical underpinnings of the cognitive interview, see D.A. Bekerian & J.L. Dennett, *The Cognitive Interview Technique: Reviving the Issues*, 7 *Applied Cognitive Psychol.* 275 (1993).

[FN152]. Ronald P. Fisher et al., *Enhancing Enhanced Eyewitness Memory: Refining the Cognitive Interview*, 15 *J. Police Sci. & Admin.* 291 (1987).

[FN153]. See *supra* text accompanying notes 138 - 49. The present version of the cognitive interview is explained clearly and in detail in Fisher & Geiselman, *supra* note 136.

[FN154]. See Fisher et al., *supra* note 137, at 250.

[FN155]. See Fisher & Geiselman, *supra* note 136, at 146 - 47.

[FN156]. See *id.* at 147- 48.

[FN157]. See *id.* at 15, 18 -19.

[FN158]. *Id.*

[FN159]. See *id.* at 18 -19.

[FN160]. See *supra* text accompanying notes 138 - 49.

[FN161]. See Fisher & Geiselman, *supra* note 136, at 148 -52.

[FN162]. *Id.* at 149.

[FN163]. See *id.* at 148, 152.

[FN164]. *Id.*

[FN165]. See Fisher et al., *supra* note 137, at 253.

[FN166]. See Fisher & Geiselman, *supra* note 136, at 153 -55.

[FN167]. See *id.* at 153.

[FN168]. See *id.* at 20, 105, 122-28.

[FN169]. See *id.* at 154.

[FN170]. *Id.*

[FN171]. See *id.* at 155.

[FN172]. *Id.*

[\[FN173\]](#). Geiselman and Fisher note that the witness is likely to continue thinking about the event and the interview long after the interview is over. The interviewer should take advantage of that mental energy by urging the witness to get back in touch with him or her. See *id.* at 156.

[\[FN174\]](#). See *id.* at 157.

[\[FN175\]](#). See *id.* at 20, 105, 122-28.

[\[FN176\]](#). *Id.*

[\[FN177\]](#). See *id.* at 77- 80.

[\[FN178\]](#). *Id.* at 19.

[\[FN179\]](#). *Id.*

[\[FN180\]](#). *Id.* at 29 (citation omitted).

[\[FN181\]](#). *Id.*

[\[FN182\]](#). *Id.*

[\[FN183\]](#). *Id.* at 41.

[\[FN184\]](#). *Id.* Researchers who have recently tested the present version of the cognitive interview have found that it increases the amount of both correct information and incorrect information that the witness provides. See Mantwill et al., *supra* note 116, at 74 -76. The increase in the latter is smaller than the former, and the overall accuracy rate is about the same or a little higher for the cognitive interview than for standard interviews. *Id.* The least one can say is that the cognitive interview produces more information than standard interviews, and that the greater amount of information is no less reliable. *Id.* The increase in incorrect information is, of course, a good reason to do further research into its cause. *Id.* See also Bekerian & Dennett, *supra* note 151, at 282- 84, 293.

[\[FN185\]](#). See Fisher & Geiselman, *supra* note 136, at 105 - 06, 134 -38.

[\[FN186\]](#). *Id.*

[\[FN187\]](#). [In re Eldridge, 37 N.Y. 161, 171 \(N.Y. 1880\)](#).

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