CARLTON FIELDS

Witness Coaching: Blurred Lines

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If you can't hear what I'm trying to say
If you can't read from the same page…[1] The Rules of Professional Responsibility speak to the ethical boundaries for a lawyer's conduct in connection with witness preparation only indirectly. Rules 1.1 and 1.3 describe competence, diligence, and zeal; and Rule 3.3 and 3.4 describe candor to the tribunal and fairness. Rule 3.3(a)(4) prohibits attorneys from adducing evidence, including testimony that they actually knew to be false. Rule 3.4(b) says that an attorney may not advise or assist a witness to testify falsely. But comment 7 to Rule 3.3 says that a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client. Consider the following "urban legend" shared with young assistant U.S. attorneys in Washington, D.C., in the 1970s, giving an unflattering and unfair commentary on practices of the assistant federal defenders.

> The Assistant Federal Public Defender sits with a new client, a young black man charged with purse-snatching and arrested in an alley near the crime scene holding the purse. Before the client can say anything, the AFPD raises his hand and says wait. Let me tell you about a case I just won. I represented a black man accused of this same crime. His defense was that he was minding his own business when another black man came running by and tossed him a purse. Next thing he knows, he gets arrested. Misidentification. Completely innocent. And the jury found him not guilty. Now — tell me what happened here. And the client's eyes go wide and he says — "same thing, it was some other guy."

If such a client interview ever happened, did the AFPD cross the ethical line? The D.C. Bar Legal Ethics Committee, in D.C. Bar Ethics Opinion 234, stated that "a lawyer may not prepare or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language, as well as the substance of testimony, and may — indeed, should — do whatever is feasible to prepare his or her witnesses for examination." The seminal case *Strickler v. Greene*, 527 U.S. 263 (1999), is instructive. *Strickler* is often cited for its discussion of a prosecutor's duties under *Brady v. Maryland*, 373 U.S. 83 (1963), and its reaffirmation of "the special role played by the American Prosecutor in the search for truth in

criminal trials:"

> Within the federal system … we have said that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.

527 U.S. at 281 (citing *Berger v. United States*, 295 U.S. 78 (1935)). In *Strickler*, a man was convicted of capital murder in connection with the abduction and killing of a college student. His case reached the United States Supreme Court on a claim that the prosecution had improperly failed to disclose exculpatory information regarding the State's star eyewitness at trial. The Supreme Court found that while *Brady* violations occurred, the other evidence at trial provided a strong showing of guilt, such that notwithstanding the obvious significance of the witness' testimony, the petitioner could not show sufficient prejudice. 527 U.S. at 264-65, 296. Hence, the conviction was upheld. The facts of the *Strickler* case, however, offer a chilling portrait of witness coaching by prosecutors and police. In *Strickler*, an African-American sophomore at James Madison University named Leanne Whitlock was abducted from a local shopping center and robbed and murdered. Two Caucasian men, Strickler and a man named Henderson, were arrested for the crimes, along with a Caucasian woman named Tudor, who assisted them. The star prosecution witness at trial was a woman named Anne Stoltzfus, who provided amazingly detailed testimony about the crime. She said she saw Strickler, Henderson, and Tudor at the mall and later observed their abduction of Whitlock in the parking lot. She was with her daughter at the time and did not report the crime until 10 days later, after talking to classmates at James Madison University where she also attended classes. She gave a very specific description of all three perpetrators:

> Strickler wore a grey T-shirt with a Harley Davidson insignia. Henderson wore a short sleeve knit shirt and neat pants. The woman had blonde hair with shaggy cut in the back and blue eyes and a sweet smile.

527 U.S. at 270, n.5. She gave a precise description of the victim:

> This woman was beautiful, well-dressed and happy, she was singing while in the car.

Id. at 271. She spoke in great detail about the perpetrators' movements inside and outside the mall and even recalled the license number of the van they were driving when they abducted Ms. Whitlock:

> She said the license number was NKA 243 and she instructed her daughter to write it down and remembered NKA by associating it with "No Kids Alone" and 243 with her age.

Id. at 272, n.7. Denying the defense lawyer's suggestion that she had learned all these details from news reports, Stoltzfus said, "I have an exceptionally good memory. I had very close contact with [Strickler] and he made an emotional impression on me because of his behavior and I, he caught my

attention and I paid attention. So I have absolutely no doubt of my identification." *Id.* at 272-73. In sum, Stoltzfus' testimony was powerful, credible and compelling. It turned out, however, that the Stoltzfus at trial was not the Stoltzfus who first spoke to police two weeks after the crime. During the post-conviction phase of the case, notes surfaced taken by a detective who conducted several interviews of Stoltzfus, along with letters that Stoltzfus wrote to the detective. According to the notes of the initial interview of Stoltzfus, she told the police that she could not identify the black female victim, nor the two white male perpetrators. *Id.* at 274. A few days later, Stoltzfus wrote a note to the detective saying that she did not even recall being at the mall on the night in question until her daughter reminded her later. She wrote "I have a very vague memory that I am not sure of." *Id.* at 275. In other notes, she mentioned seeing a van, but not the license plate number and even thanked the detective for his patience in helping her with her "sometimes muddled memories." *Id.* Contrary to the terrifying incident that she confidently described in her trial testimony, she wrote the detective that her initial perception of the incident was "as a trivial episode of college kids carrying on" that her daughter did not even notice. *Id.* at 282. The Supreme Court focused on whether Strickler satisfied all requisites to show a constitutional violation under *Brady*, ultimately determining that because of the strength of other evidence in the case, he did not. The Court never discussed the question whether the prosecutor and the police aided and encouraged Stoltzfus to reconstruct her memory to fit the prosecution's theory of guilt. In *Kyles v. Whitley*, 514 U.S. 419 (1995), another often cited *Brady* case, the Supreme Court saw another capital murder case where the prosecutor at trial relied heavily on the testimony of an eyewitness who gave an extremely detailed description of the killing. The witness said he saw Kyles struggle with the victim, pull a small black gun from his right pocket, and shoot the victim, and then drive off in the victim's car. But in a statement the witness made to the police shortly after the shooting, which was not disclosed to the defense, the witness said he did not see the actual murder and did not see Kyles outside the victim's vehicle. 514 U.S. at 442-44. The Supreme Court overturned Kyles' conviction because of the failure to disclose material information to the defense and opined that the witness's original story had apparently been adjusted by the prosecutor by the time of trial. *Id.* at 443. The Court noted that disclosure of the witness's prior statements not only would have destroyed confidence in his testimony but also would have raised "a substantial implication that the prosecutor had coached him to give it." *Id.* at 443 n.14. A recent racketeering and fraud prosecution in Miami saw similar behavior. *State of Florida v. Jeffery Smith* involved allegations of fuel theft and false billings at the Miami International Airport. Smith worked for a company with a contract to remove environmental waste and contaminated water that spilled onto the tarmac. A man named Brian Schneir worked at the airport fuel farm and ultimately pled guilty to a fraud charge and agreed to cooperate. He was deposed before trial and his deposition testimony established he had limited knowledge about dates and amounts of purported fuel theft. At trial, however, Schneir was much more precise about events and spoke of years and years of thefts of huge volumes of fuel. What the defense did not know, and what the prosecution chose not to disclose, was that days before the trial started, Schneir was given a script by the prosecution of how his testimony should proceed. The script even referenced changes from the pretrial sworn statement and how to explain the deviations. Smith was convicted of some charges. The script

surfaced prior to Smith's sentencing, only because the State got into a disagreement over whether Schneir had earned the deal he had been promised. Smith's conviction was subsequently reversed. In connection with any criminal trial, prosecutors and defense lawyers will spend countless hours working with witnesses and preparing them to testify. Section 116 of the Restatement (Third) of Law Governing Lawyers (2000) explains that in preparing a witness to testify, a lawyer may invite the witness to proved truthful testimony favorable to the lawyer's client. Preparation of the witness may include discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony that will be presented; discussing the law that applied to the events in issue; reviewing documents and other physical evidence, and discussing probable lines of hostile cross-examination. The Restatement acknowledges that there is relatively sparse authority on witness preparation. This is so in part because in most cases improper witness coaching does not come to light, if at all, until cross-examination at trial or in post-conviction disclosures. Even then, much like what happened in *Strickler v. Greene*, *supra*, the argument tends to address discovery and *Brady*-type obligations and not the ethical conduct of the parties. This may be in part because the line between permissible witness preparation and impermissible coaching has been likened to the "difference between dusk and twilight." *See* Adam Liptak, Crossing a Fine Line on Witness Coaching, N.Y. Times, March 16, 2006. There can be no question that concerns about witness coaching are fairly pointed at both the prosecution and the defense. No side is immune to the pressures to win. An extreme example and cautionary reminder of consequences is the recent indictment of Chicago criminal defense attorney Beau Brindley. Mr. Brindley represented a man named Alexander Vasquez, who was arrested in 2008 in connection with a botched cocaine deal. The Government claimed that Vasquez had driven a car belonging to a woman named Marina Collazo to a McDonald's parking lot where the drug deal was supposed to occur. Federal agents later found $23,000 in cash, the purported payment for a kilo of cocaine, hidden in a secret compartment behind the car's dashboard. According to the indictment, Brindley coached Collazo to testify falsely that she asked Vasquez to use her car to pick up her husband at the last minute and that he had no idea about the cash or about any drug deal. Investigators say they uncovered a letter in which Brindley told Collazo how to respond to questions at trial and to act surprised and offended in responding to the prosecution's questions. During Vasquez' trial, Brindley asked Collazo whether in all his meetings with her, he had ever even once told her what to say, and Collazo replied "no." According to the indictment, Brindley also prepared false testimony for Vasquez and rehearsed it in detail, but Vasquez never took the stand. Mr. Brindley pleaded innocent, and his case is pending trial. Interestingly, Vasquez was convicted on one charge and acquitted of another charge at his trial. Vasquez was sentenced to 20 years in prison and is now accusing Brindley of ineffective assistance. Query whether Vasquez is now the beneficiary of a cooperation agreement? Regardless of its outcome, the Brindley prosecution demonstrates the dangers of any misstep in witness preparation. Ultimately, so much of the criminal justice system depends, in the words of Tennessee Williams, upon the kindness of strangers. It is a self-policing system in which the courts expect lawyers to behave correctly and are too often ill-equipped to resolve whether lawyer behavior falls short. Witness coaching is an example of the and aspirational

nature of the system. Whatever happened to Joe Friday and "Just the facts, ma'am"? *A version of this article was included in the course materials for the American Bar Association's 29th Annual National Institute on White Collar Crime.*

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[1] Lyrics – Robin Thicke – "Blurred Lines."

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