

ARTICLES

THE ANTI-FALSE TESTIMONY PRINCIPLE AND THE FUNDAMENTALS OF ETHICAL PREPARATION OF DEPOSITION WITNESSES

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I. INTRODUCTION

On any given business day, thousands of civil depositions occur in law offices and hotel conference rooms around the country. In the days before these depositions, lawyers spend countless hours with witnesses—sometimes more time than the depositions themselves—to prepare these witnesses to testify. These preparation sessions are private and remain shielded from opponents and courts under the cloak of the attorney-client privilege.¹ However, basic ethical principles still govern these preparation sessions, even if the extent of the lawyer's compliance with those principles remains unknown. Most lawyers want to obey the standards of the profession, and this is the reason that the ethical principles governing witness preparation require careful study. This Article is directed to lawyers who take the rules of professional conduct seriously and scholars who understand that solutions to the problems of legal ethics are not mere abstractions, but an essential part of practical professionalism.

Scholarly study of the ethical principles that govern the preparation of deposition witnesses is almost non-existent.² Although trial is an infrequent occurrence in civil cases, there exists a traditional but inaccurate paradigm that views “the trial” as the natural and ordinary litigation end-game.³ Discussing witness preparation influenced by this paradigm promotes a failure to address the particular problems that arise in preparing deposition witnesses; yet, *because* trials are uncommon, it is a mistake to regard depositions simply, or even primarily, as devices for trial preparation. Rather, in most cases, depositions play a critical role in posturing cases for settlement and in laying the groundwork for dispositive pre-trial motions. Thus, if witness preparation generally is “the ‘dark secret’ of the legal profession . . . neither taught in law school . . . and rarely litigated or even discussed in scholarly literature,”⁴ this failure to focus on depositions leaves unexamined the arena in which most witnesses in civil cases actually testify.

A basic premise of this Article is that the ethical rules for preparing deposition witnesses require their own analysis. Deposition testimony differs from trial testimony primarily because the range of permissible inquiry at

1. DAVID M. MALONE ET AL., *THE EFFECTIVE DEPOSITION* 210 (3d ed. 2006).

2. See, e.g., Liisa Renée Salmi, *Don't Walk the Line: Ethical Considerations in Preparing Witnesses for Deposition and Trial*, 18 REV. LITIG. 135, 136 (1999) (noting that witness preparation is not taught in law school nor is it a frequent topic in the secondary literature).

3. See, e.g., Christopher Lutz, *Multi-Level Depositions*, 16 LITIG. 9, 14 (1990) (“Never lose sight of the fact that what you do in a deposition is subservient to your trial goals. You do not develop information, on any level, just as a curiosity. It all must be fit into a trial plan.”).

4. See Salmi, *supra* note 2, at 136 (citing John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 279 (1989)).

depositions greatly exceeds that which is admissible evidence at trial. The scope of proper deposition inquiry is limited, not by the stringent criteria of admissibility, but by the generous standard that the information sought must only “appear [to be] reasonably calculated to lead to the discovery of admissible evidence.”⁵ Moreover, because judges are not present to supervise depositions, and lawyers are permitted to instruct witnesses not to answer only in limited circumstances,⁶ witnesses must be prepared to answer questions that a court would never permit at trial. Despite the pervasive and important nature of deposition practice, the dearth of ethical guidance in this area forces many lawyers to rely merely on the guidance of a mentor or ill-defined folklore. This Article attempts to provide lawyers with a more useful framework for navigating their way through these issues.

The Article makes three fundamental claims. First, it argues that the ethical rules governing witness preparation reflect a single underlying moral principle that we call the Anti-False Testimony Principle. Second, it argues that deposition witnesses are required to give two fundamentally different kinds of testimony: testimony about events that took place in the past, which we call testimony about the historical record, and testimony about present understandings of relevant issues. The third claim marries the first two claims, maintaining that the Anti-False Testimony Principle operates differently depending on the kind of testimony to be given, providing more substantial limitations on testimony recounting the historical record than on testimony about present understandings.

Part II of the Article provides a brief introduction to the scope of deposition practice. Part III discusses the rules governing the actions lawyers are permitted to take in preparing their witnesses to testify in depositions. This Part argues that the various ethical rules reflect the more general, underlying principle that we call the Anti-False Testimony Principle. Part IV elaborates on the distinction between the two basic kinds of testimony that non-expert witnesses are called on to give: testimony about the historical record and testimony about present understandings. This distinction is critical, because as Part V shows, a lawyer’s ethical obligations vary considerably depending on whether the witness is being prepared to testify about the historical record or about present understandings. Part V—the core of the Article—explains the various ways in which the Anti-False Testimony Principle applies. On one hand, the Principle applies stringently when lawyers prepare witnesses to testify about the historical record, which is testimony based on memories either

5. *See, e.g.*, FED. R. CIV. P. 26(b)(1).

6. Generally, instructions not to answer are proper only to protect a privilege or an assertion of protection under the work product doctrine or to enforce a court order. FED. R. CIV. P. 30(c)(2) (“A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to represent a motion under Rule(d)(3).”).

of the witnesses' past perceptions or of their past mental states. On the other hand, the application of the Principle is more limited when lawyers prepare witnesses to testify about their present understandings, which relate to and form a critical part of the litigation positions that the lawyers have been hired to develop. Part VI concludes by summarizing the framework of various ethical rules regarding deposition testimony.

II. THE IMPORTANCE AND BREADTH OF DEPOSITION PRACTICE

A. Preparation of Deposition Witnesses: A Pervasive Yet Unstudied Aspect of Litigation Practice

Only about two percent of all civil cases filed actually go to trial.⁷ If a case enters discovery—that is, except where it settles or is dismissed soon after it is filed—witnesses are nearly always deposed.⁸ It follows that, by volume, nearly all testimony given in civil disputes is offered during depositions. More particularly, even when cases do go to trial, deposition practice will have been critical, because competent counsel will have been careful to “lock in” the testimony of key witnesses beforehand in their depositions. Thus, whether trial occurs or not, the critical time for preparing a witness is before his or her deposition.⁹

7. See JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2008 ANNUAL REPORT OF THE DIRECTOR 71 (2009), <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf> (noting that in the twelve-month period ending September 30, 2008, of the 233,826 cases filed in United States district courts, 4723 cases were disposed of during or after trial—a total of approximately two percent).

8. See MALONE ET AL., *supra* note 1, at xiii–xiv (discussing the need for effectively taking and defending depositions regardless of whether the case will go to trial).

9. See, e.g., DENNIS R. SUPLEE AND DIANA S. DONALDSON, THE DEPOSITION HANDBOOK § 102[B] (4th ed. 2002) (explaining that deposition testimony may be preserved regardless of its potentially harmful nature). *But see* Charles Silver, *Preliminary Thoughts on the Economics of Witness Preparation*, 30 TEX. TECH L. REV. 1383, 1387–89 (1999) (observing that “lawyers probably prepare witnesses less often than commonly believed” and that “lawyers *probably* do not prepare witnesses intensively”) (emphasis added) (capitalization omitted). Professor Silver cites little evidence for his assertion, and his observation is difficult to credit. Indeed, most litigators know that bypassing the opportunity to prepare witnesses—and to prepare them intensively—is foolhardy. See, e.g., *Odone v. Croda Int’l PLC*, 170 F.R.D. 66, 69 (D.D.C. 1997) (“An attorney has an ethical duty to prepare a witness.”); *see also* *Christy v. Pa. Tpk. Comm’n*, 160 F.R.D. 51, 53 (E.D. Pa. 1995) (providing that communication between witnesses and counsel prior to depositions is not limited; rather, it is encouraged as part of the lawyer’s duty to prepare deposition witnesses). It is not too much to say that spurning the opportunity to prepare key witnesses is an invitation to malpractice and perhaps even triggers a duty on the part of the lawyer’s firm to notify its professional liability carrier. See *generally* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 20:2–20:3 (2008 ed. 2008) (discussing the standard of care and “parameters of competence” necessary for a lawyer to fulfill her ethical obligation of representing a client with diligence and competence).

Despite the abundance of “how-to” handbooks on taking and defending depositions,¹⁰ scholarly commentary on a lawyer’s ethical obligations in pre-deposition witness preparation is neither recent nor extensive.¹¹ Practitioner-oriented works on deposition practice generally focus on subjects other than ethical pre-deposition witness preparation, particularly on misconduct during depositions, but some do discuss ethical considerations.¹² The absence of informed commentary is especially unfortunate, because there is—and inevitably always will be—an absence of case law defining what lawyers can properly do in preparing their witnesses, for the obvious reason that the preparation of fact witnesses is protected from scrutiny by the attorney-client privilege.¹³

This lack of guidance on pre-deposition witness preparation needs to be remedied—and not simply for the general reason that a gulf between the academic study of law and its practice disembodies the one and impoverishes

10. See generally DAVID A. BINDER ET AL., DEPOSITION QUESTIONING STRATEGIES AND TECHNIQUES (West Group 2001) (explaining strategies and techniques for conducting depositions and deposition preparation); MALONE ET AL., *supra* note 1, at 1 (analyzing the mechanics of taking and defending depositions); CHRIS MARTINIAK, HOW TO TAKE AND DEFEND DEPOSITIONS xv (3d ed. 2002) (focusing on strategies, tactics, and other elements of deposition skills); SUPLEE & DONALDSON, *supra* note 9 (providing general guidance on conducting depositions and general deposition practice).

11. See generally Applegate, *supra* note 4; W. William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH L. REV. 1343 (1999); Salmi, *supra* note 2, at 136–37; Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 1–3 (1995). Although specifically addressing trial testimony, see Joseph D. Piorowski, Note, *Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of “Coaching,”* 1 GEO. J. LEGAL ETHICS 389 (1987) for a useful discussion of witness preparation. For a further discussion of ethical witness coaching in the trial context, see Fred C. Zacharias & Shaun Martin, *Coaching Witnesses*, 87 KY. L. J. 1001 (1999).

12. See, e.g., James M. Altman, *Witness Preparation Conflicts*, 22 LITIG. 38, 38–41, 43, 67–68 (1995) (outlining some ethical principles of witness deposition preparation); see also Clark R. Hudson & Jackie M. Ni Mhairtin, *Preparing Your Client for Deposition or Trial Testimony*, 59 FED’N DEF. & CORPORATE COUNS. Q. 63, 63–69 (2008); James W. McElhaney, *Be Careful in the Woodshed*, A.B.A. J., Aug. 2005, available at http://www.abajournal.com/magazine/be_careful_in_the_woodshed/print/; Henry Morrissette, *Tips for Preparing Your Corporate Witness for Deposition*, 75 DEF. COUNS. J. 105, 105–08 (2008); Peter M. Panken & Mirande Valbrune, *Enforcing the Prohibitions Against Coaching Deposition Witnesses*, 17 PRAC. LITIG. 15, 15–18, 20, 22 (2006).

13. See MALONE ET AL., *supra* note 1, at 210. The attorney-client privilege applies when a lawyer prepares his or her individual client for deposition. When a lawyer defends the deposition of someone other than the client, an attorney-client relationship exists for the purpose of providing legal representation in the deposition. This commonly occurs when a lawyer, who represents a corporation and not individual corporate officers, defends the deposition of a corporate employee. See MODEL RULE OF PROF’L CONDUCT R. 1.13 (2009). This is not, however, the only circumstance; if the deposition of any non-party witness is sought, a lawyer may represent that witness, and the scope of the engagement will be limited to the defense of the deposition.

the other. Although one commentator optimistically contends that “from a . . . pragmatic perspective, false testimony rarely goes unnoticed,”¹⁴—a proposition that every lawyer concerned with the maintenance of high ethical standards in the profession *hopes* to be true—verifying the extent of the unnoticed false testimony is logically impossible. Plainly stated, deposition preparation is a secret process, and, absent a slip by the witness or counsel, or the presence of an undetected recording device,¹⁵ what has occurred during deposition preparation will never come to the court’s or bar’s attention. The consequence of this secrecy is that, practically speaking, lawyers are essentially “on their honor” to prepare witnesses in accordance with ethical standards, knowing that enforcement of such standards is rare. Lawyers of high standards want to understand and uphold their duties even if they know that, alas, some members of their profession may treat the secrecy of witness preparation as a license to act improperly.

B. The Breadth of Deposition Inquiry

Deposition preparation is important not only because of the frequency of depositions, but also because of the breadth of deposition inquiry. Depositions differ from trial testimony in three important respects. First, except on rare occasions, deposition witnesses testify outside of the presence of a judge, meaning that the proceedings are controlled by the interplay between the lawyers and the conduct and attitude of the witness. Second, witnesses primarily answer questions posed by the opposing party’s counsel, which essentially amounts to unrestrained cross-examination without the limitations provided by the scope of a preceding direct examination.

The third reason that deposition testimony deserves to be treated differently than trial testimony is that—except in the case of *de bene esse* depositions taken to preserve testimony for trial—the rules of evidence do not apply.¹⁶ Thus, apart from the attorney-client privilege, the work product doctrine, or a judicially-imposed restriction on the scope of discovery in the particular case, deposition rules only limit the scope of examination by the broad and flexible standard that the information sought be “reasonably calculated to lead to the discovery of admissible evidence.”¹⁷ Given its broad scope, deposition inquiry regularly elicits information that would be inadmissible at trial, and competent

14. See Altman, *supra* note 12, at 38.

15. See *In re Attorney Disciplinary Matter*, 98 F.3d 1082, 1084–85 (8th Cir. 1996) (affirming the disbarment of an attorney after a court reporter’s device recorded a conversation between an attorney and his client in which the attorney advised his client to commit perjury).

16. See FED. R. CIV. P. 26(b)(1) (articulating the scope of discovery to include any relevant information); see also MALONE ET AL., *supra* note 1, at 280 n.2 (referring only to Rule 804 of the Federal Rules of Evidence as specifically applicable to *de bene esse* depositions).

17. FED. R. CIV. P. 26(b)(1) (“Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.”).

lawyers must prepare their witnesses to respond to a broad array of questions. This scope extends beyond the obvious statement that hearsay, though generally excludable at trial, is regularly and appropriately elicited in depositions. A witness may properly be asked to recount what he or she perceived regarding events that took place at a relevant and generally definable time in the past.¹⁸ Such testimony sometimes includes the witness's opinions or inferences about those facts, which may be inadmissible.¹⁹ Testimony about the historical past can also recount states of mind that the witness can recall experiencing at relevant times in the past—for example, the witness's own state of mind when a contract was being signed or the reason the witness made certain decisions while designing a product or treating a patient, notwithstanding that such testimony may be inadmissible under the parol-evidence rule.

But extended questioning that elicits inadmissible testimony about the historical record is not the whole of it. Because the scope of a deposition is so broad, deposition witnesses are often asked to testify about their present understandings. For example, in complex commercial cases where the parties' obligations flow from contracts, parties are regularly asked to describe their present understanding of those obligations.²⁰ In other cases, including tort cases, present understandings are relevant to whether past conduct can be explained, excused, or justified.²¹ When witnesses offer testimony about present understandings, they are doing something quite different from reporting their present memories of past perceptions: they are describing their current understanding of a certain aspect of the case.²² The literature does not explain how, if at all, the ethical rules of witness preparation differ in these two situations—present memories of past perceptions or past mental states, and

18. On occasion, this Article will describe persons as “he” or “she.” Generally, however, in order to avoid confusion, we adopt the convention of using the feminine pronoun to refer to lawyers who are either preparing, defending, or questioning witnesses, and the masculine pronoun to refer to the witnesses themselves.

19. See FED. R. EVID. 701 (articulating the rule for opinion testimony by lay witnesses at trial).

20. See, e.g., *Minebea Co. v. Papst*, 355 F. Supp. 2d 526, 530 (D.D.C. 2005) (stating that it is appropriate to question a witness as to his present understanding of a contract term); see also *infra* Part V.C.1.

21. See *infra* Part V.C.1.

22. A third kind of testimony in both depositions and at trial is expert testimony. Doctrinally speaking, expert testimony is not testimony about facts. Experts assist the trier of fact—the jury or, in a bench trial, the judge—to understand facts that are thought to be beyond the scope of a layperson's knowledge. See FED. R. EVID. 702, 706 (articulating the Federal Rules of Evidence for “Testimony by Experts” and “Court Appointed Experts”). The special issues of expert testimony and the preparation of experts for their depositions are beyond the scope of this Article.

present understanding.²³ Part V of this Article explains the different ethical requirements that should govern preparing witnesses to give these two different types of deposition testimony. The point here is that the preparation of deposition witnesses is an important and identifiable field of study because deposition practice regularly encompasses a broader range of questions than those that are frequently permitted at trial.

III. THE ANTI-FALSE TESTIMONY PRINCIPLE AND THE MEANING OF “FALSE TESTIMONY”

A. The Basic Ethical Requirements: The Components of the Anti-False Testimony Principle

The fundamental ethical tenets affecting a lawyer’s witness preparation duties, which are equally applicable in deposition or at trial, are cast as two prohibitions on the introduction of “false” testimony. Rule 3.4(b) of the Model Rules of Professional Conduct (Model Rules) provides that “[a] lawyer shall not . . . (b) falsify evidence, [or] counsel or assist a witness to testify falsely,”²⁴ and Rule 3.3(a) of the Model Rules requires that “[a] lawyer shall not knowingly . . . (3) offer evidence that the lawyer knows to be false.”²⁵ Although Model Rules 3.4(b) and 3.3(a)(3) apply in different situations, their goal is the same—to prevent a lawyer from tampering (actively or passively) with the factual record. Together, these rules reflect a fundamental and underlying principle that aims to prevent lawyers from placing incorrect and dishonest testimony in the record. We call this underlying concept the “Anti-False Testimony Principle.” Although the most problematic situations require detailed discussion,²⁶ the Anti-False Testimony Principle generally imposes three broad prohibitions on lawyers, all of which are designed to bar a lawyer from gaining an advantage from dishonest litigation practices: (1) suborning

23. Two commentators notice, but do not develop, the significance of the fact that witnesses testify about their “observations *or opinions*.” See Applegate, *supra* note 4, at 304 (emphasis added); see also Wydick, *supra* note 11, at 25 (developing two categories of witness testimony). Professor Wydick distinguishes between, but does not elaborate on, the ethical significance of the fact that a witness testifies “about either of two things: (a) the events in question or (b) what the witness believes about the events in question.” Wydick, *supra* note 11, at 25. Wydick further discusses witness beliefs about their perceptions, offering examples of different categories of “knowledge.” *Id.* at 20–22.

24. MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (2009).

25. *Id.* at R. 3.3(a)(3). Both Rule 3.3(a)(3) and Rule 3.4(b) can be read as specific iterations of the general rule directed to the entire range of a lawyer’s activities embodied in Rule 1.2(d): “A lawyer shall not counsel a client to engage, or assist a client in, conduct that a lawyer knows is criminal or fraudulent.” *Id.* at R. 1.2(d)

26. See *infra* Part V.B.3.

perjury (for example, deliberately requesting a witness to testify falsely);²⁷ (2) misleading or otherwise manipulating a witness into testifying inaccurately, either when the lawyer knows the testimony is false or when the lawyer fails to establish that the altered testimony is true;²⁸ and (3) knowingly permitting a witness to testify falsely, even when the lawyer played no role in procuring the false testimony.²⁹ Each state has rules that articulate substantially the same standards³⁰—rules that apply equally to trial testimony and to

27. See MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (prohibiting a lawyer from falsifying evidence).

28. See *infra* Part V.B.1.b.

29. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a).

30. See AM. BAR ASS'N, CTR. FOR PROF'L RESPONSIBILITY, ABA MODEL RULES OF PROFESSIONAL CONDUCT: STATE ADOPTION OF MODEL RULES, http://www.abanet.org/cpr/mrpc/model_rules.html (indicating that every state, other than California, imposes professional conduct rules similar to the ABA Model Rules of Professional Conduct). Despite this widespread adoption of the Model Rules, however, a small minority of the individual states' rules on false testimony show material variances from the Model Rules. For instance, Florida's Rule 4-3.4(b) notes that "[a] lawyer shall not *fabricate* evidence, [or] counsel or assist a witness to testify falsely," but the Rule does not offer an explanation as to any substantive or intended effect of Florida's use of the word "fabricate" instead of "falsify" as used in the ABA's Model Rules. 35 FLA. STAT. ANN. R. 4-3.4(b) (2008) (emphasis added) (codifying the Florida Rules of Professional Conduct). New York's Rule 3.4 is substantially different from the ABA Model Rule, both in form and content; the New York Rule notes that "[a] lawyer shall not . . . knowingly use perjured testimony or false evidence; [or] participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false." N.Y. RULES OF PROF'L CONDUCT R. 3.4(a)(4)–(5) (2009). Rule 3.03(a)(5) of the Texas Rules of Professional Conduct adds an additional element to ABA Model Rule 3.3(a) (imposing a proscription against *offering* evidence that the lawyer knows to be false) by indicating that the lawyer also cannot *use* such evidence. TEX. GOV'T CODE ANN. § 84(G), app. A, R. 3.03(a)(5) (Vernon 2005). Conversely, Texas Rule 3.03(a)(1) adds the element of materiality to the rule against making false statements to the tribunal. *Id.* at R. 3.03(a)(1). It thus appears that, in Texas, one may make false statements in court as long as that false statement is not deemed to be material. *Id.* New Mexico's interpretation of the ABA Model Rules is also unusual. Rule 16-102(D) of the New Mexico Rules of Professional Conduct expands on the corresponding ABA Model Rule by stating:

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent or *misleads the tribunal*. *A lawyer may, however, discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*

N.M. STAT. R. 16-102(D) (2009) (emphasis added to highlight language in the New Mexico rule that does not appear in the ABA Model Rule). Rule 16-202(A) of the New Mexico Rules of Professional Conduct, like Texas's Rule on this same point, also adds the materiality requirement to the proscription against making false statements to a tribunal. *Id.* at R. 16-303(A)(1); TEX. GOV'T CODE ANN. § 84(G), app. A, R. 3.03(a)(5). New Mexico Rule 16-303(A)(3) further differs from the Model Rule concerning falsifying evidence, providing that a lawyer shall not "offer evidence that the lawyer *knows* to be false." N.M. STAT. R. 16-303(A)(3) (emphasis added). In the New Mexico Rules, the word "knows" is internally defined as "actual knowledge of the fact in question." *Id.* at R. 16-100(F). Further, New Mexico Rule 16-303(A)(3) provides

depositions³¹—and, as such, the Anti-False Testimony Principle guides and constrains all lawyers practicing in the United States.

B. *The Two Meanings of “False Testimony”*

Lawyers and judges often use the expression “false testimony” in two different circumstances. This double usage can generate confusion for readers. Even though context often helps to clarify the meaning, only one of these usages is encompassed by the Anti-False Testimony Principle. In the first usage, “false” means the opposite of “true” and is used to assert only that a statement is incorrect. “False testimony,” then, simply means that the testimony is untrue or incorrect. Employing this meaning, Justice Kennedy, dissenting in *James v. Illinois*, wrote that “[i]n some cases, of course, false testimony can result from faulty recollection,” thus equating falsity with (mere) inaccuracy.³² Because there is nothing morally questionable about simply being mistaken, this usage of “false” carries no moral opprobrium. It is not the target of the ethical rules, and thus is not the focus of the Anti-False Testimony Principle.

On the other hand, “false testimony” sometimes offers ethical or moral criticism. It is this sense of “false” that the Anti-False Testimony Principle encompasses. In this context, “false testimony” refers to testimony offered to *deceive* the court and, hence, to pervert the objective of accurate fact-finding. Witnesses, of course, may attempt deception on their own by offering testimony that they—but not their lawyers—know to be inaccurate. Such conduct may appropriately be punished by the criminal law. Grounded in the rules governing the conduct of lawyers, however, the Anti-False Testimony Principle applies when—and only when—the lawyer participates actively or passively in the deception. There are two general circumstances in which such a violation occurs: (1) the testimony is incorrect *and* the lawyer and possibly, but not necessarily, the witness *know(s)* that it is incorrect; and (2) the lawyer and possibly, but not necessarily, the witness *advance(s)* the testimony for litigation advantage, *willfully disregarding* inquiry into its factual accuracy.

that “a lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false,” a distinction that leaves unclear whether a lawyer may alternatively choose to offer such evidence, given that the rule uses the permissive “may” rather than the mandatory “shall.” *Id.* at R. 16-303(A)(3).

31. See, e.g., Comm. on Prof'l Ethics & Conduct of Iowa Bar v. Crary, 245 N.W.2d 298, 304–05 (Iowa 1976) (applying Iowa’s version of Model Rule 3.3(a)(3) in the context of a deposition perjury charge to revoke the license of a lawyer who knew that his client was testifying falsely in her deposition).

32. *James v. Illinois*, 493 U.S. 307, 326 (1990) (Kennedy, J., dissenting). The *James* case is further examined in Part V.B.2.b. See *infra* notes 165–70 and accompanying text.

Both of these circumstances fall within the ambit of Model Rule 1.2(d) and its ban on a lawyer's participation in criminal or fraudulent activity.³³

Before it is possible to delve into the most problematic areas in which the the Anti-False Testimony Principle applies, it is necessary to consider the previously noted distinction between testimony recounting the historical record—past perceptions and past mental states—and testimony describing present understandings.

IV. THE DISTINCTION BETWEEN FACTS IN THE HISTORICAL RECORD AND FACTS CONCERNING UNDERSTANDINGS

The first step in examining a lawyer's ethical duties when preparing a fact witness to testify is to distinguish the two general categories of facts about which the witness is required to testify. The most common category of facts, which is frequently treated as if it were the *only* category,³⁴ is the category of witness reports about what happened in the past. This category, in turn, has two sub-categories: (1) reports of perceptions that the witness experienced sometime in the past and (2) reports about his state of mind, also at sometime in the past. Together, these facts constitute—so far as any particular case is concerned—the historical record. Rarely discussed, however, is another category of facts: facts about the present understandings of a witness that explain or sometimes justify the witness's conduct or the witness's current belief about his obligations. The reason why it is necessary to explain these categories at the outset is simple: as this Article will show, a lawyer's ethical duties under the Anti-False Testimony Principle vary markedly depending on whether testimony is sought about the historical record or about present understandings.

A. *Factual Testimony: Accessing the Historical Record*

Testimony that accurately describes a portion of the historical record requires, first, that there actually was an event in the past and, second, that the witness is capable of offering a description of it. The first of these requirements, which we call verifiable facts, is necessary to any historical account. The second—the ability of the witness to testify—varies, depending on whether the witness testifies about an event in the world external to his mind, or whether he recounts his own past state of mind. Where he testifies

33. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .").

34. See generally Morrissette, *supra* note 12, at 105–06 ("The witness must be able to articulate what happened, what they did or did not do, and why they did or did not do it."); Salmi, *supra* note 2, at 139–43 (examining ethical considerations of preparing witnesses' recollection of prior events); Wydick, *supra* note 11 (articulating a framework for the ethical coaching of witnesses in testifying about past events).

about perceptual facts, his testimony has two components: first, what he perceived at the time of the perception and, second, what he remembers about those perceptions at the time he testifies. Where a witness testifies about what he thought at the relevant time in the past, his testimony is based on his memory of what may be called his “mental event.”

1. Verifiable Facts

Litigating questions of fact consists of attempting to prove what actually occurred. In many civil cases, particularly tort cases, the facts that lawyers develop purport to mirror or report events in the physical world.³⁵ But litigation also can concern the witness’s state of mind at some point in the past. When lawyers talk about “what happened,” they can mean either “what actually happened out there in the physical world,” or “what someone thought at a particular time,” or both. The assumption behind such statements is that there really is, or was, something out there in the world to which reference can be made and about which factually correct statements can be made.

To lawyers, then, it is second-nature to accept that (however difficult they may be to prove in particular cases) there really are facts “back there” or “out there” in the past. So deeply held is this view that lawyers frequently have trouble understanding how or why philosophers have struggled, at least since the seventeenth century, if not since classical antiquity, to provide an account that they, as philosophers, consider to be satisfactory proof of the “obvious” proposition that there is a physical world that exists separate and apart from one’s perceptions of it. Further, lawyers, as well as other laypersons, find it puzzling that philosophers worry about whether the facts constituting such a world can be known.³⁶ Notwithstanding these concerns, the working assumption in the legal system is that there are facts “out there” that, in principle, can be known, and that assumption is not challenged here.

To say that facts “as they really are” can be known is to say that they are, again in principle, verifiable. On this assumption, the goal of the fact-finder in litigation is to determine what these “verifiable facts” are.³⁷ The practical goal of litigation, from the court’s point of view, therefore, is to get as close as

35. See generally MALONE ET AL., *supra* note 1, at 21–25 (explaining that a central purpose in taking depositions is gathering facts about what happened in events leading to the litigation).

36. See generally THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 929–31 (Robert Audi ed., Cambridge Univ. Press, 2d ed. 1999) (defining “truth” in the context of philosophy as “the quality of those propositions that accord with reality, specifying what is in fact the case”). It is no exaggeration to say that proving the existence of a world outside of our own minds—and determining whether there is language that can actually correspond to such a world—has been one of the principal tasks of Western philosophy, at least since the work of French philosopher Rene Descartes (1596–1650). For those untrained in philosophy, see *id.* at 223–27, 273–78 (providing a brief description of the issues within entries for “Descartes” and “Epistemology”).

37. See *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21–22 (1990) (noting that a finding of perjury was “sufficiently factual” to be verified by examining “objective evidence”).

possible to such facts as the frailties of human perception and memory permit. The fundamental ethical goal of the Anti-False Testimony Principle supports this quest. The basic thrust of the Anti-False Testimony Principle is to prohibit lawyers from interfering with that quest by altering the record to include factual statements that contradict—and are known to contradict—real or verifiable facts merely because other alleged facts would strengthen their cases.

2. *Perceptual Facts: What Was Perceived and What Is Remembered*

When a witness testifies to a fact based on his perception, two requirements are necessary for the testimony to be accurate. First, the witness must have perceived the event or phenomenon he is describing; and, second, he must accurately remember what he perceived. Persons have firsthand knowledge of events that took place in the physical world when they claim knowledge of those events based on the operation of one or more of their five senses. Most commonly, these are reports of what witnesses saw or heard, though sometimes witnesses also report results from their sense of touch (in the testimony of a victim in a burn case), taste (in a food poisoning case), or smell (in a pollution nuisance case). In law, firsthand witnesses are competent to testify about these events because of—and only because of—their perceptions; hence they are percipient (or perception) witnesses.³⁸ Obviously, a perceptual witness can be mistaken about his perception, a possibility that the lawyer preparing a witness to testify, the lawyer taking his deposition, or the lawyer at trial cross-examining the witness will explore. The purpose of such a challenge is to show that the facts as the witness says he perceived them vary from the true, verifiable facts.

Typically, perception witnesses testify about *past* perceptions, although occasionally witnesses are asked to testify about a present sense impression, such as identifying a particular person in the courtroom. Where witnesses testify about past perceptions, however, their testimony about such perceptions is one step removed. Except in the infrequent present sense impression case, perception witnesses do not testify about their current perceptions; rather, they testify about their *memories* of past perceptions. This means that the testimony that witnesses give about past perceptions is not, strictly speaking, testimony about the perceptions themselves. The traditional expression “firsthand knowledge” is therefore something of a misnomer, for a witness can only testify about what he remembers of his past perceptions. A witness is permitted to testify because he *had* direct firsthand knowledge of events in the past. His testimony, however, can only report his *present memory* of that perception. Again, it will be fair game for an adverse party’s

38. BLACK’S LAW DICTIONARY 1634 (8th ed. 2004) (defining “percipient witness” as “[a] witness who has perceived the things about which he or she testifies”).

lawyer who examines the witness—whether in his deposition or on cross-examination at trial—to challenge the accuracy of that memory. As a result, the duty of the lawyer preparing the witness to testify will include making him aware that his memory will be the subject of examination. While the Anti-False Testimony Principle may permit the preparing lawyer from trying to shore up his witness’s memory, it does not permit the lawyer to try to create a memory that the witness does not have.³⁹

Accordingly, in an asbestos bodily-injury case, where the question is whether the plaintiff (or the plaintiff’s decedent) inhaled fibers manufactured by a particular defendant, the plaintiff will need to tie the defendant-manufacturer to the plaintiff’s injury. A witness likely can only accomplish this feat by testifying that he worked in the plant where the injury was alleged to have occurred and that he *remembers* seeing packages with the defendant asbestos-maker’s name on it. If the plaintiff fails to offer such testimony, the defendant will prevail on its motion for summary judgment; this was the fact pattern in *Celotex Corp. v. Catrett*, the United States Supreme Court opinion widely cited for summary judgment principles.⁴⁰ The same method of proof is required whenever “what happened” is the issue. Unless a recording device was present when the events at issue occurred,⁴¹ persons who witnessed events are only able to testify about what they perceived or, more precisely, what they *remember* about those perceptions at the moment of their testimony. Just as faulty perception can cause perception testimony to vary from verifiable facts, so too can faulty memory. Just as lawyers violate the Anti-False Testimony Principle by altering accounts of perceptions, so too do they violate it by persuading a witness to remember what he actually does not remember.

3. *Past States of Mind and Memories of Past States of Mind*

If many verifiable facts take place in the external world, many also take place in the mind. At particular times, people have particular states of mind. We can call these mental events.⁴² We use the word “events” because that

39. See *infra* notes 149–55 and accompanying text for a more complete discussion of what exactly the Anti-False Testimony Principle requires in this regard.

40. *Celotex Corp. v. Catrett*, 477 U.S. 317, 319–20 (1986).

41. See *Scott v. Harris*, 550 U.S. 372, 380–81 (2007) (declining to adopt plaintiff’s statement of the facts when that rendition did not comport with the Justices’ perceptions of a video recording of the event in question); see also Leah A. Walker, *Will Video Kill the Trial Courts’ Star? How “Hot” Records will Change the Appellate Process*, 19 ALB. L.J. SCI. & TECH. 449 (2009), available at http://works.bepress.com/leah_walker/1/.

42. Laypersons and lawyers commonly cast this distinction as one between physical and mental events. Drawing the distinction in this way leaves unanswered the question about what goes on in the human brain. Whether mental states are simply chemical and physical phenomena or whether they are something more is a question of interest to philosophers, neurobiologists, and (perhaps) theologians. For purposes of what lawyers need to know, however, these questions can

word implies that people have states of mind at identifiable times. Thus, for example, suppose that in a deposition in a medical malpractice case, a doctor-defendant is asked why he chose to follow one course of treatment, rather than another, in caring for the plaintiff-patient. What the doctor *actually* thought when he made his treatment choice is as much a part of “what really happened” as what the people involved saw or heard.⁴³ In such an example, what the doctor actually thought in choosing a course of treatment is a verifiable fact. Testimony about past mental events is similar in many respects to testimony about past perceptions. First, such past states of mind, in principle, constitute verifiable facts in the same way that past perceptions do. Second, when testifying, the doctor can only testify about what he *remembers* thinking at the relevant time. The operation of the Anti-False Testimony Principle regarding a witness’s memory of his past thoughts is identical to its operation regarding his memory of his past perceptions.

Testimonial reports of past perceptions and of past mental states, therefore, constitute testimony that reports relevant portions of the historical record. Sometimes, in an imperfect world, testimony about the historical record will not correspond to the verifiable facts. In the case of testimony about perceptions, testimony can be honestly erroneous either because the witness’s perceptions were mistaken or because his memories are clouded. In the case of testimony about past mental statements, testimony can be honestly erroneous because of flawed memory. Thus, there is always the possibility that testimony about the historical record will not correspond to the true, verifiable facts. Notably, however, honest errors in perception or memory do not violate the Anti-False Testimony Principle because no deception is involved. Before examining various kinds of cases in which the Anti-False Testimony Principle works to prevent deceptive alteration of the historical record, however, it is important to distinguish a kind of testimony that fact witnesses routinely give in depositions and which does not constitute a part of the historical record.

B. Factual Testimony: A Witness’s Present Understanding

According to a widely-accepted legal definition, “[f]acts include not just tangible things, actual occurrences, and relationships, but also states of mind such as intentions and opinions.”⁴⁴ Testimony about *some* states of mind, as shown, is broadly similar to testimony about perceptions: a witness is asked to recount, at the time of his testimony, what he remembers thinking, just as he

be put aside. By using the expression “mental events,” therefore, we make no claims about whether or to what extent such mental states have a non-physical component.

43. Although mental events are frequently difficult to prove other than by the testimony of the person whose mental state is at issue, this is not necessarily the only testimony that is available; for example, another doctor or nurse in the operating room could testify about what the defendant-doctor *said* at the time he made a choice in treatment.

44. BLACK’S LAW DICTIONARY 628 (8th ed. 2004) (defining “fact”).

may be asked to describe what he remembers perceiving. Frequently, however, a witness's *contemporaneous* state of mind is relevant in litigation and constitutes a routine subject of deposition inquiry.

This is true both where parties voluntarily undertake obligations, as in transactions, and where the law imposes involuntary duties, as in torts. Suppose, first, that a dispute between Developer and Builder arises out of their contract for the construction of a large commercial office park. Because of certain circumstances that took place during construction, Builder claims that it was entitled under the agreement to substitute a lower-cost product. In deposition discovery addressing this issue, counsel would doubtless elicit testimony recounting any conversations between the persons who negotiated the contract, or between principals of the two companies, about this issue—even if, at trial, such testimony might be barred under the parol evidence rule.⁴⁵ Although this testimony would clearly constitute memories of perception—what the witness heard himself or someone else say—such testimony would be relevant—at least for discovery purposes—to show the contemporaneous state of mind of persons who negotiated the contract concerning the right to substitution. Regardless of whether mental states that were not communicated by witnesses at the time of contract formation would be deemed relevant and admissible at trial,⁴⁶ there is little doubt that inquiry in a discovery deposition about a witness's state of mind is relevant as “reasonably calculated to lead to the discovery of admissible evidence.”⁴⁷

45. 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33.1 (4th ed. 1999) (explaining that the parol evidence rule “prohibits the admission of extrinsic evidence of prior or contemporaneous oral agreements or prior written agreements, to explain the meaning of a contract when the parties have reduced their agreement to an unambiguous integrated writing”).

46. See *Durbin v. National Loan Investors, L.P.*, No. C02-0302 BZ, 2002 WL 32799676, at *4 (N.D. Cal. Dec. 16, 2002) (“It is well-established that evidence of a ‘subjective, uncommunicated intent of one of the parties’ to a contract cannot be used to contradict the terms of the contract.” (quoting *Yount v. Acuff Rose-Opryland*, 103 F.3d 830, 836 (9th Cir. 1996))), *rev’d on other grounds*, 111 Fed. App’x 485 (9th Cir. 2004); *DeSilva v. Commonwealth*, No. 2796-08-02, 2009 WL 3425363, at *3 (Va. Ct. App. Oct. 27, 2009) (noting that “uncommunicated intent is not relevant to the issue of the accused’s intent”).

47. See FED. R. CIV. P. 26(b)(1). Contract cases present a stark example of the principle that testimony legitimately sought in depositions is often much broader than what is admissible at trial. It is well-settled that the interpretation of a contract is a question of law for the court. See, e.g., *Scottsdale Ins. Co. v. Torres*, 561 F.3d 74, 77 (1st Cir. 2009); *Bragg v. Bill Heard Chevrolet, Inc.*, 374 F.3d 1060, 1065 (11th Cir. 2004); *Seaboard Lumber Co. v. United States*, 308 F.3d 1283, 1292 (Fed. Cir. 2002). Under the parol evidence rule, courts generally treat contracts that are deemed unambiguous as instruments that must be interpreted on the plain meaning of the language contained therein. WILLISTON & LORD, *supra* note 45, at § 33.1 (setting forth the parol evidence rule). In the process of interpreting the contract, the court will likely refuse to admit testimony as to what the persons who executed the contract thought it meant, unless the court is persuaded that the contractual language is ambiguous. Notwithstanding the parol evidence rule, lawyers generally elicit deposition testimony about what the people who negotiated the agreement

Such inquiries, however, do not exhaust the range of testimony that examining counsel would seek from officials of both the Builder and the Developer. These witnesses could *also* be asked about their present understandings of the contractual obligations. As in administrative law, where parties may sometimes rely on “post hoc” rationalizations of agency actions,⁴⁸ what parties think at the time of litigation may be relevant to determine the legal significance of what happened in the past. Such testimony is an important part of many depositions, especially in complex commercial cases.⁴⁹ As will be shown below, it is critical to distinguish this category of testimony, because the Anti-False Testimony Principle applies less stringently to testimony about a witness’s present state of mind than it does to testimony about the historical record.⁵⁰

To illustrate why present understandings are an important part of deposition practice, we first consider the hypothetical contract case just discussed, followed by a hypothetical tort case in which testimony beyond the historical record would likely be sought. Suppose that, in the contract for the construction of the large commercial office park just hypothesized, the question presented—whether and, if so, in what circumstances, Builder may substitute lower-cost products—turns on the reading of one clause in the contract. Suppose further that the clause can plausibly be read in different ways—by Builder to support an argument that, under certain circumstances, it had the right to substitute product, and by Developer to preclude such substitution. To make the case realistic, let us further assume that both Builder and Developer are corporations, which means that the parties themselves will have no understanding, except that which is attributed to them by their agents. As the dispute ripens into one in which both parties understand that an amicable settlement will not be reached, management of each of the companies retains counsel. Finally, let us assume that, on the language itself, the case is a close one, such that neither party, acting on the advice of counsel, is prepared immediately to offer a settlement at a price the other is likely to accept.

thought about the terms to which they were agreeing. Testimony about what witnesses understood in the past or—as this Article will address—at present is frequently placed before courts even though it would not be admitted at trial. For example, in summary judgment briefs or in briefs in support of motions in limine, counsel will often cite the testimony of what witnesses thought in an effort to persuade the court to read the unambiguous language their way, or to open the door to the admission of extrinsic evidence by declaring the contract ambiguous.

48. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971), *remanded*, 335 F. Supp. 873 (W.D. Tenn. 1972), *rev’d*, 494 F.2d 1212 (6th Cir. 1974). A court may sometimes use post hoc affidavits to provide additional explanations of agency actions. See, e.g., *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 6 (D.C. Cir. 2006); *Am.’s Cmty. Bankers v. Fed. Deposit Ins. Corp.*, 200 F.3d 822, 835 (D.C. Cir. 2000); *Sys. Plus, Inc. v. United States*, 69 Fed. Cl. 757, 765 n.5 (Fed. Cl. 2006); *PGBA v. United States*, 60 Fed. Cl. 196, 204 (Fed. Cl. 2004).

49. See *infra* Part V.C.1.

50. See *infra* Part V.B–C.

The lawyers for each side are aware that under the applicable substantive law, contract language susceptible to two separate meanings is deemed ambiguous⁵¹ and that the law permits parties to a contract to introduce extrinsic evidence to ascertain the meaning of ambiguous terms.⁵² Such a scenario raises at least four questions for the lawyers on each side. All four of these questions relate to the ultimate question: what does the contract term mean? The first question is the perception question—was anything communicated about the meaning of the contractual terms at the time the agreement was made? The second question is the contemporaneous mental state question—did the officials of the lawyers’ corporate client, or officials of the opposing party corporation, have any contemporaneous understanding of the terms now at issue when the deal was finalized? The third and fourth questions are different. For each side, the questions are as follows: what position are we going to take on the meaning of the contract term at issue? And, what position is the other side going to take on the same issue? Answers to all four of these questions help counsel determine what position to take on that question of law. But—and this is the critical point for the issue presently under consideration—answers to the third and fourth questions—what one’s own position should be and what the position of its opponent is likely to be—are unconstrained by what people said or thought in the past. These questions are not questions that can be answered by appeal to the historical record.

In practice, the third and fourth questions are likely to be the most important and also the most contentious. As lawyers who litigate complex contract disputes know, it is quite probable that when the organization’s principals negotiated the construction contract at issue, there likely was no discussion of the present issue—the right to substitute lower-cost products. Indeed, it is quite possible that the principals, as distinguished from their lawyers, never even considered the issue. The principle that agreements reflect a meeting of the minds of the contracting parties—one that all lawyers learned in their first-year Contracts classes—is more a legal presumption than a generally verifiable statement of empirical psychology. When business people negotiate a deal, they come to an agreement about key issues such as the price and the details of performance, and then they turn the matter over to their lawyers to “reduce the deal to writing.” It is unlikely that the persons whose minds are presumed to have met carefully considered the specific terms of performance—terms that were later included in the contract by the transactional lawyers. This reality means that in creating the legal positions that both Builder and Developer will take, the parties’ lawyers are unlikely to discover—either in interviewing their own clients or in taking depositions of parties on the opposing side—any

51. See generally WILLISTON & LORD, *supra* note 45, at § 30:5 (explaining that a court will find a contract to be ambiguous if the language is susceptible of more than one meaning).

52. *Id.* § 30:7 (noting that extrinsic evidence may be examined to resolve ambiguous language).

memories of past conversations between representatives of both parties (or even between persons in the same company) or any memories of what the principals thought at that time.

Thus, in addition to their inquiries about the historical record, lawyers on both sides will ask—and prepare their own witnesses to respond when asked—about the witness's (or, if it is the deposition of a corporate representative, the representative's⁵³) understanding of the meaning of the contract term in dispute or, more generally, about whether the Builder was entitled to substitute products during construction. Asking such questions constitutes a time-honored method for determining what position the other side will take on a disputed issue, and preparing one's witness to answer them is a key step in a lawyer's development of the position her client will take.⁵⁴ Answers to such questions may also help inquiring counsel determine the level of conviction with which the other side holds its position—knowledge that can be critical in settlement negotiations. Any lawyer preparing to defend the deposition of a corporate official in the Builder-Developer litigation will need to prepare her witnesses for such questions. Such questions elicit testimony about present understandings, not about the historical record.

Tort cases nearly always contain disputes about past events. In some tort cases, however, questions also arise about present understandings, which constitute or refute post hoc rationalizations justifying or excusing the conduct that allegedly injured the plaintiff. Suppose that an airliner crashed during take-off in a snowstorm, killing everybody on board. In litigation brought by the personal representatives of the decedents, one of the plaintiffs' lawyers' theories is that the design of the engines was defective, so that for certain technical reasons, it made the engines likely to have destabilized the airplane during adverse weather conditions. A second theory is that the airline was negligent in its maintenance of the aircraft, the way in which the pilots were trained, and the way in which the pilots handled the plane at the time of the crash. Assume that among the defendants are the manufacturer of the aircraft and the manufacturer of the engines. In litigation of this sort, in addition to expert testimony, deposition witnesses would be asked to testify about the

53. See FED. R. CIV. P. 30(b)(6) (specifying the rule for deposing a corporate representative).

54. See generally Kent Sinclair & Roger P. Fendrich, *Discovering Corporate Knowledge & Contentions: Rethinking Rule 30(b)(6) & Alternative Mechanisms*, 50 ALA. L. REV. 651, 687 (1999) (discussing a lawyer's duty to prepare a Rule 30(b)(6) witness). Questions of the witness's own understanding of a particular occurrence are routinely asked of both individual fact witnesses noticed for deposition in federal procedure under Rule 30(b)(1) and of Rule 30(b)(6) witnesses. FED. R. CIV. P. 30(b)(1), (6). For an extensive discussion of Rule 30(b)(6) deposition practice criticizing, among other things, the use of Rule 30(b)(6) depositions in place of contention interrogatories, see Sinclair & Fendrich, *supra*, at 707–09.

historical record; for example, memories of past events such their recollection of the design decisions.

Plaintiffs, however, would also depose the manufacturer's engineers and executives about their present understanding of the issues concerning engine design. Indeed, if the defense put forth by the manufacturers is likely to have much of a chance of succeeding, formulation of a persuasive position on why the design, in hindsight, was sound would be essential. Since these understandings could prove to be a critical part of the defense on this aspect of the claim, competent preparation of these witnesses for their depositions would require preparation on how to answer these "present understandings" questions. Again, as in the contract dispute previously discussed, it is clear that such testimony is not about perceptions. Rather, it is about understandings.

V. THE APPLICATION OF THE ANTI-FALSE TESTIMONY PRINCIPLE TO PERCEPTUAL FACTS AND FACTS CONCERNING PRESENT UNDERSTANDINGS

The fundamental distinction about the working of the Anti-False Testimony Principle concerns whether a lawyer is preparing her witness to testify about the historical record or about his present understanding. Testimony about the historical record is supposed to describe what really happened in the past, whether in the physical world or in the mind of a person. Testimony about present understandings, in contrast, does not recount facts that exist in the historical or external world. It is the *interpretation* of the present significance of phenomena that prompts an inquiry from counsel such as, "what do you think (understand) Paragraph 17(a) of the contract required your company to do?"

At the most basic level, therefore, the operation of the Anti-False Testimony Principle regarding testimony about the historical record is easy to observe. Where a witness testifies about his memories of the relevant historical record, the Anti-False Testimony Principle, drawn from Model Rules 3.3(a)(3) and 3.4(b),⁵⁵ precludes a lawyer from altering the witness's account of the historical record, or offering testimony that the lawyer knows inaccurately reports that record. Put differently, the Principle constrains a lawyer's conduct in two distinct, but morally identical, situations: (1) where the lawyer has a motive⁵⁶ to induce her client to tell a more favorable story than the verifiable facts in the historical record warrant and (2) where the lawyer believes that the witness himself is tailoring his testimonial story to achieve that end. More particularly, a lawyer cannot induce or permit a witness to testify that he (the witness) perceived something different than what he is confident that he did

55. MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (2009).

56. See *infra* notes 70–74 and accompanying text.

perceive;⁵⁷ nor can a lawyer induce or permit a witness to say he remembers or does not remember something when such a statement is false.⁵⁸ Where the witness is testifying about his present understanding, however, there is no pre-existing baseline of historical fact that constrains the lawyer. While, as we shall see, the Anti-False Testimony Principle precludes a lawyer from assisting a witness to offer as his understanding what he does not believe,⁵⁹ the main potency of the Principle lies where testimony concerns the historical record.

In this Part, we first consider the circumstances that have led to ethical concerns about the activities of lawyers preparing witnesses to testify about their perceptions. We then discuss certain solutions to issues that leading commentators have proposed regarding preparing witnesses to testify about the historical record. This discussion will consider the ramifications of the Anti-False Testimony Principle on a range of issues that commentators have discussed and that lawyers regularly encounter. Having considered the Anti-False Testimony Principle in these historical contexts, we will then show why the Principle has only limited applicability to a lawyer's preparation of her witnesses to testify about their present understandings. This discussion will show that if litigators are to be able to perform the functions for which their clients hired them—to construct and successfully litigate cases—they must be subject to much less stringent ethical limitations when assisting witnesses to testify about present understandings than when preparing them to testify about perceptions.

A. The Duty to Represent the Client Vigorously and Curbing the Objective Motivation to Strengthen the Record

A lawyer's categorical duty not to attempt to place evidence that is inaccurate and known to be inaccurate in the record is not subject to debate.⁶⁰ Like the statesman's pre-eminent duty to avoid nuclear war,⁶¹ this duty, though yielding to none in significance, presents few questions of fundamental policy. Simply stated, for the lawyer committed to integrity and the highest professional standards, Model Rules 3.3 and 3.4 require that she must accept the historical facts of a case as they are.⁶² From a purely ethical point of view,

57. See, e.g., *Nix v. Whiteside*, 475 U.S. 157, 168–71 (1986) (ruling that a lawyer's duty to refrain from proffering false evidence extends even when her client chooses to give false testimony on his own volition).

58. See *id.*

59. See *infra* notes 83–85 and accompanying text.

60. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (stating that a lawyer shall not "offer evidence that the lawyer knows to be false").

61. See BRIAN BARRY, POLITICAL ARGUMENT 1xxiv (Univ. of Cal. Press 1990) (explaining that a statesman's duty to avoid "an all-out nuclear war is so plain as to be philosophically uninteresting").

62. MODEL RULES OF PROF'L CONDUCT R. 3.3, 3.4 (2009).

therefore, a lawyer is always safe in allowing her witnesses to tell their stories as they remember them, in the words that initially come to their minds. Where they apply, the ethical rules trump the desire to win a case; but a mere scrupulous compliance with the ethical rules is *not* the only goal of a lawyer. More is at stake. The important question—the question that lawyers preparing their clients constantly face—is “What can I do to make this testimony better *without* violating the ethical rules?”

Clients hire lawyers to achieve results, and lawyers, as generally competitive people, want to win, separate and apart from whether they have a financial stake in the outcome. If a case gets very far into litigation, both sides’ cases are likely to contain a number of “good” (favorable) and a number of “bad” (unfavorable) facts, because if all facts tilt in one direction and the lawyers are rational and can persuade their clients to be the same, the case will settle before extensive pre-trial activities occur. On the other hand, the goal to improve settlement posture (or to prevail at trial if necessary) creates an incentive for lawyers to push the envelope in preparing their witnesses to testify. The incentive to “improve” the record, therefore, is *objective*—that is, it does not depend on the character of a lawyer or how highly she values the ethical rules. The “better” the testimony in the record (and the less the amount of unfavorable testimony), the better the lawyer’s chances of prevailing in a case. This objective motivation cannot be gainsaid, but the Anti-False Testimony Principle shows that it is neither the only nor even the most important factor in play. Without suggesting that the Anti-False Testimony Principle (or any other ethical principle) can ever be legitimately violated, one of a lawyer’s basic duties in representing her client is to try to achieve the best possible result.⁶³

The rules do not require that lawyers adopt the completely passive posture of a potted plant when hearing how their clients or witnesses describe events that they perceived. This principle is supported by at least one leading commentator who has dealt with the problem of the objective motivation for a lawyer to improve her case.⁶⁴ Indeed, we agree with Professor Hodes that

63. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* 578 (1986) (“[T]he American lawyer’s professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client’s interests as those are ultimately defined by the client.”); see also MODEL RULES OF PROF’L CONDUCT R. 1.3 cmt. 1 (“A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor.” (emphasis added)). Likewise, the annotation to Rule 1.2(a) of the Annotated Model Rules of Professional Conduct notes that “[i]f the lawyer fails to carry out these objectives, through, for example, a lack of diligence or competence, this will, a fortiori, constitute a violation of Rule 1.2.” ANN. MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (6th ed. 2007).

64. See generally Hodes, *supra* note 11 (addressing a lawyer’s duty to represent her client zealously).

exclusive preoccupation with not running afoul of ethical rules can compromise the vigorous representation to which the client is entitled.

At law school orientation one year, . . . a retired judge told entering students that legal ethics is easy. “You simply find the line between what is permitted and what is not,” he said, “and stay far, far to the good side of that line.” I completely disagree, as I told my first year Professional Responsibility students in our first hour alone together.

Legal ethics is hard. You must *try* to find the line between what is permitted and what is not, and then get as *close* to that line as you can without crossing over to the bad side. Anything less is less than zealous representation—which *already* leaves you on the *bad* side of the line.⁶⁵

Compliance with the ethical standards of the profession, therefore, does not simply mean walking nowhere near the line where misconduct begins.⁶⁶ The ethical rules—and not just those under discussion here as the Anti-False Testimony Principle—function like a trump card. Where the rules are implicated, their strictures apply. Clients need to understand this fact, but, as Professor Hodes explains, professional duty requires zealous representation.⁶⁷ The Anti-False Testimony Principle operates to check the objective motivation to strengthen the content of the record. The Anti-False Testimony Principle, in short, is a brake upon the duty of zealous representation. In what follows, we analyze the types of situations in which the duty to represent the client vigorously must yield to the Anti-False Testimony principle.

65. *Id.* at 1366 (footnote omitted). Further in his article, Professor Hodes discusses what we have called the Anti-False Testimony principle, explaining:

[t]he trick, of course, is judging how far to proceed along the spectrum that I have already conceded runs from refreshing recollection all the way to prompting perjury. Journey not far enough, and a lawyer deserves sanction for failing to carry out the most basic duties encompassed by the client-lawyer relationship. Go too far, and a lawyer has strayed into sanctionable and perhaps criminal territory.

Id. at 1350 (footnotes omitted).

66. Notwithstanding the title of her article, “Don’t Walk the Line,” Ms. Salmi does not suggest that lawyers are entirely precluded from *any* conduct that may enhance a witness’s testimony, such as discussing the applicable law, refreshing a witness’s recollection of the facts about which he will be called upon to testify, and even suggesting modifications of the word choice witnesses initially used to describe their perceptions and demeanor. *See Salmi, supra* note 2, at 154–65. For a discussion of the difficult question regarding a lawyer’s request that a witness change his words, see *infra* notes 204–06 and accompanying text.

67. Hodes, *supra* note 11, at 1366.

1. Curbing the Objective Motivation to Alter the Account of Events: The Basic Thrust of the Anti-False Testimony Principle

The easiest application of the Anti-False Testimony Principle occurs in situations in which accounts of historical events are concerned. As suggested immediately above, where events are concerned, lawyers have an objective motivation to make the testimony about such events as favorable as possible. Moreover, clients have the same motivation, although sometimes it takes a lawyer's description of the case for clients to understand where their objective interest lies. The Anti-False Testimony Principle's clearest thrust is to bar dishonest or deceptive testimony about the historical record.

On reading most of the existing literature on witness preparation, one could be excused for thinking that witnesses only testify to recount their memories of what they personally have perceived, and that consequently, the Anti-False Testimony Principle operates exclusively to prohibit lawyers from tampering with remembered accounts of those perceptions.⁶⁸ This narrow focus is a mistake. In the previous Part, we have shown that testimony is not limited to accounts of what happened, physically or mentally, at some time in the past. Although it is arguably a chicken and egg problem, one reason for this narrow focus has doubtless been that commentators have almost entirely devoted their attention to tort and criminal cases, rather than disputes arising out of transactions. The importance of tort cases is not questioned here; instead, we question the unarticulated assumption in much of the literature that the typical witness preparation problem in a civil case arises in such cases.

Tort cases are, by and large, about *events*. It is no exaggeration to say that the settlements of many (if not most) tort cases turn on what counsel on both sides of the dispute believe a jury would find based on testimony "locked in" during depositions of key witnesses. As we will show, however, a critical part of a tort case can involve testimony about a present understanding.⁶⁹ For the present, it is sufficient to notice that testimony about historical events can figure prominently in transactional litigation. In deference to the traditional way of discussing this problem, we start with a tort scenario.

In the mid- to late-1990s, an incident that prompted important scholarly commentary on witness preparation arose out of the conduct of the Dallas law firm of Baron & Budd. Fitting neatly into the pattern of focusing on events, the incident showed the temptations lawyers face in procuring more favorable testimony about such events. Baron & Budd represented numerous workers allegedly injured by asbestos products.⁷⁰ The incident arose from the inadvertent disclosure of a twenty-page document prepared by that firm,

68. See sources cited *supra* notes 62–63.

69. See *infra* Part V.C.1 (demonstrating the importance of the testimony of a present understanding by working through a medical malpractice hypothetical).

70. See Hodes, *supra* note 11, at 1344, 1352.

entitled *Preparing for Your Deposition*.⁷¹ Like *Celotex Corp. v. Catrett*, asbestos bodily injury cases frequently turn on whether the plaintiff can prove that he or she inhaled asbestos manufactured by a particular defendant.⁷² If the plaintiff or his witnesses cannot show that a particular defendant manufactured the harm-causing product, as the *Celotex* Court held, that defendant can secure summary judgment and escape trial. The risk that the claimant's lawyer can prompt a recollection that is not genuinely that of the witness is thus severe.⁷³

A witness, even when he is the plaintiff, may not independently understand the legal necessity of tying a particular manufacturer's product to the plaintiff's injury. During the time that a person now stricken with asbestosis worked in a factory, it was likely unimportant to notice whether there were asbestos cartons identifying a particular manufacturer lying around the factory floor. Indeed, it may well be a matter of chance if the plaintiff or a fellow worker happens to remember this detail at all. To the plaintiff's lawyer, however, offering such testimony may be a matter of victory—a lucrative settlement or a favorable jury verdict—or defeat. The *motive* for a claimant's lawyer to persuade a witness to say that he saw what he did not see, or to say that he remembers seeing what he cannot now be sure he saw, is thus substantial.⁷⁴ When his lawyers explain this legal position to him, the plaintiff-witness himself will objectively share the same motivation. Curbing this motivation to alter the factual record is thus a central purpose for which the ethical rules prohibiting false testimony are designed.⁷⁵ Without such rules, there would be no check on the objective motivations to improve testimony, and thus improve the strength of a lawyer's case.⁷⁶

Tort cases do not uniquely contain objective motivations to alter the record of past perceptions. Take, for example, a simple contract case. Suppose that a contract provides that Vendor will supply Purchaser with a shipment of blue

71. For a full discussion of this incident by a lawyer serving as an expert witness in the case, see *id.* at 1344–51.

72. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 319–20 (1986).

73. See Salmi, *supra* note 2, at 159.

74. See *id.*

75. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2 (2009).

76. See generally Salmi, *supra* note 2, at 143, 145–46, 159 (offering instances where a lawyer may have motives to improve the testimony of a witness). As a further example, the Baron & Budd memorandum shows lawyers crossing the line in a number of places in furtherance of the goal of improved testimony; the law firm's improper purpose is clearly illustrated by the instruction to prospective witnesses contained in the improper memorandum—*Preparing for Your Deposition*—that documents such as the memorandum itself that “you are reading right now, are ‘privileged’ and should never be mentioned.” *Id.* at 143 n.35 (quoting Bob Van Voris, *Client Memo Embarrasses Dallas Firm: Baron & Budd Coaching of Witnesses Called Improper*, NAT'L L. J., Oct. 13, 1997, at A30). The fact that such a document *existed* would not be privileged (even if the contents were). The law firm's false claim of privilege in circumstances in which none existed strongly suggests the impropriety of—and the firm's awareness of the impropriety of—this preparation and coaching device.

widgets on or before a certain date. If Purchaser claims that Vendor breached either by shipping widgets that are not blue or by shipping the widgets after the specified date, or both, Purchaser may prove its case for breach of contract through the testimony of a receiving clerk who can testify about the color of the widgets when he looked at them, or about the date on which the shipment arrived. Assuming that the shipping clerk shares the motivation of his corporate employer (perhaps believing it is in his employment interest to do so), his motivation will be the same as that of the asbestosis plaintiff regarding the memory of his perception. He will have an objective reason to say he remembers seeing the blue widgets when they arrived, whether that is genuinely his memory or not, and it will be consistent with his objective interest to say he remembers the date on which the widgets arrived, perhaps claiming that his recollection was refreshed by a document, regardless of whether it was or was not. (The penalties of perjury, of course, present a contrary objective interest to the witness.) Similarly, when a witness's past mental state is at issue, a witness has motivation to say that his mental state is the one that is most favorable to his case. The company's lawyer, just like the plaintiff's lawyer in the asbestosis case, shares the same motivation.

Party witnesses and lawyers thus have a motivation to provide favorable accounts of events to the extent they understand the relationship between those accounts and the applicable law (or, in the case of witnesses, have had this relationship explained to them by their lawyer). As indicated, we call this an *objective* motivation because it does not arise from a subjective mental state of either the witness or the lawyer to deceive the court, even though lawyers and witnesses doubtlessly have such subjective motivations. Assuming that, all other things being equal, the lawyer or client (or both) is acting rationally, he or she will seek to present the most favorable factual account possible. Of course, all other things are not equal: the rules of ethics, and more particularly the Anti-False Testimony Principle, function to trump the objective motivation to manufacture the most favorable factual account possible.

2. *Types of Morally Objectionable "False Testimony"*

As previously discussed, lawyers, judges, and commentators sometimes use the expression "false testimony" to describe testimony that is merely inaccurate. We have argued that the Anti-False Testimony Principle relates only to testimony that is inaccurate *and* that carries some moral opprobrium, because the lawyer has participated, in one way or another, in an effort to deceive the court.⁷⁷

Morally improper testimony comes in a number of guises. In the first category, the witness decides, without the contrivance of his lawyer, to give testimony that he knows is false, and he does so in order to deceive the court.

77. See *supra* text accompanying notes 26–32.

A witness can falsify and attempt to deceive either by what he says about his perception or his memory. Thus, a witness can testify falsely in this sense either because the witness knows he did not perceive what he now testifies he did perceive or because he says he (clearly) remembers perceiving something that, in reality, he does not remember. Further, “not remembering” in this context encompasses the following: (1) that the witness does not remember *at all*; (2) that he does not remember with the certainty with which he says he remembers; or (3) that he remembers something contrary to what he now says he remembers. All of these cases are examples of false testimony that is both inaccurate and deceptive, for in each case, the witness is *lying*. If the lawyer knows that the testimony is false, even on the assumption here that she did not procure the false testimony, the lawyer violates Rule 3.3(a)(3) if she does not “take reasonable remedial measures,” because that rule prohibits a lawyer from introducing evidence that the lawyer knows is false.⁷⁸ Even if the lawyer never learns that the testimony is false and a product of the witness’s deception, the testimony is still morally improper because it is a lie and may, if the facts come to light, subject the witness to prosecution for perjury.⁷⁹ In such a case, however, the moral opprobrium falls exclusively on the witness. Because the lawyer was unaware of the inaccuracy or the deception, this case does not fall within the Anti-False Testimony Principle.

A second category of morally improper testimony occurs when a lawyer procures the inaccurate testimony with the intent of deceiving the court. The plain language of Model Rule 3.4(b) prohibits a lawyer from “counsel[ing] or assist[ing] a witness to testify falsely.”⁸⁰ Here, there are two sub-categories. In the first, the lawyer may induce the witness to recount the more favorable story, and the witness himself may be aware of the deception. Lawyer and witness, in such a case, are effectively co-conspirators. On the other hand, in some cases, unlike *Nix v. Whiteside*,⁸¹ the witness *believes* his testimony is truthful, but the lawyer knows that the testimony is inaccurate because, by subtle manipulation, the lawyer has induced her witness to adopt the inaccurate

78. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2009); *see also* *Nix v. Whiteside*, 475 U.S. 157, 168 (1986) (ruling that counsel is required to disclose false testimony given by a client). For an instance in which the lawyer knows that the testimony is inaccurate but the witness genuinely believes it is accurate, see *infra* notes 81–85 and accompanying text.

79. *See, e.g.*, 18 U.S.C. § 1623(a) (2006) (“Whoever under oath . . . in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.”).

80. MODEL RULES OF PROF’L CONDUCT R. 3.4(b).

81. *Nix*, 475 U.S. at 160–61 (demonstrating a situation in which a witness wanted to give false testimony but the lawyer refused to assist him in doing so).

memory.⁸² For example, in a typical asbestosis personal injury case, where the plaintiff must show that the victim inhaled asbestos fibers manufactured by a particular defendant in order for that defendant to be liable,⁸³ a lawyer may decide to use suggestive techniques to persuade her witness to believe that he remembers seeing the names of certain manufacturers on product labels. If the lawyer succeeds in her manipulation, the witness is not *lying*, because he now believes that what he is testifying is correct, even though it is not. This case is thus the opposite of the case discussed above,⁸⁴ where the witness—but not the lawyer—knows the testimony is inaccurate. In that case, the witness may be guilty of perjury and the lawyer has done nothing wrong; in this case, however, the witness has done nothing wrong, but the lawyer has violated the Anti-False Testimony Principle—specifically Model Rule 3.4(b).⁸⁵

It is clear that lawyers are implicated in wrongdoing when false testimony is on the record, and they *know* that the testimony is inaccurate, yet they permit or encourage its introduction because it strengthens their case.⁸⁶ This knowledge requirement extends to both actual knowledge and constructive knowledge; a lawyer cannot escape her ethical obligations when she induces her witness to alter his testimony in a way that enhances the case, but then argues that her conduct is acceptable because she does not *know* that the more favorable testimony is false.⁸⁷ It is only logical to interpret the Anti-False Testimony Principle to apply under the familiar principle that a lawyer is responsible for what she knows or reasonably should know.⁸⁸ A lawyer thus has a duty of reasonable investigation to make sure that the testimony she permits her witness to give—or that which she assists her witness in formulating—is accurate.⁸⁹

82. See *infra* notes 108–10 and accompanying text for a discussion of the circumstance where the witness believes he is testifying accurately—and lawyer knows that the witness’s testimony is *inaccurate*—but the testimony is not the result of the lawyer’s intentional elicitation of inaccurate testimony; rather, it is the product of the lawyer sending an implicit message of how the story should be portrayed.

83. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 319–20 (1986); see also *supra* notes 44–45 and accompanying text.

84. See *supra* text accompanying note 79.

85. See MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (prohibiting a lawyer from “counsel[ing] or assist[ing] a witness to testify falsely”).

86. See *id.*

87. See generally D.C. Bar Op. No. 79 (1979), reprinted in DIST. OF COLUMBIA BAR, CODE OF PROF’L RESPONSIBILITY & OPINIONS OF THE DIST. OF COLUMBIA BAR LEGAL ETHICS COMM. 138 (1991) (articulating the limits on a lawyer’s participation in deposition preparation to include presenting all evidence “unless [the lawyer] *knows*, or from facts within his knowledge *should know*, that such testimony or evidence is false, fraudulent, or perjured” (emphasis added)).

88. See *id.*

89. See MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 8.

From these general principles, it is necessary now to consider how the Anti-False Testimony Principle applies to the preparation of deposition witnesses in specific areas where problems can arise. We begin with testimony about the historical record.

B. Ethical Duties of Lawyers in Preparing Witnesses to Testify About the Historical Record

1. The Easy Case: A Lawyer May Not Present False Testimony

The most basic ethical command governing witness preparation bars the informed presentation of inaccurate testimony.⁹⁰ As previously explained, this standard operates in two different circumstances. First, even if a lawyer did not procure the false testimony, she may not offer testimony to the tribunal that she knows to be false.⁹¹ Second, a lawyer may not attempt to procure or induce false testimony.⁹² This bar operates whether or not the witness knows his testimony is false. What violates the Anti-False Testimony Principle is the lawyer's knowledge that the testimony is inaccurate. So far as the Anti-False Testimony Principle is concerned, these are easy cases.

a. Permitting the Introduction of False Testimony

The easiest case concerns the unequivocal prohibition on the introduction of testimony that both the lawyer and the witness know is false in that it is inaccurate and introduced with the intent to deceive. Another easy case arises when the lawyer offers testimony that she knows is inaccurate, even if the lawyer played no part in fabricating the inaccurate testimony. Model Rule 3.3(a)(3) squarely prohibits such conduct.⁹³ This issue was addressed in the landmark United States Supreme Court decision, *Nix v. Whiteside*.⁹⁴

In *Nix*, the defendant in a murder case wanted to argue self-defense.⁹⁵ Shortly before trial, the defendant contradicted the story he had told his lawyer earlier, saying that he saw something metallic in the victim's hands, and that he planned to so testify.⁹⁶ His lawyer doubted the veracity of this newly minted story and instructed his client that he could not testify with the altered version

90. *See id.* at R. 3.3(a)(3).

91. *See id.*

92. *See id.* at R. 3.4(b). For a discussion of the issues pertaining to different types of lawyer conduct that procure inaccurate testimony, see *infra* Part V.B.1–2.

93. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3). Although *Nix* preceded the current version of the Model Rules of Professional Conduct, there is little doubt that *Nix* reflects the Rule 3.3(a)(3) standard barring the introduction of false testimony. *Nix v. Whiteside*, 475 U.S. 157, 168 (1986).

94. 475 U.S. at 159.

95. *Id.* at 160.

96. *Id.* at 160–61.

of the facts.⁹⁷ The Supreme Court ruled that the defendant did not have a constitutional right to present the story that his lawyer thought was false and that the lawyer complied with his ethical duty by refusing to allow testimony that he felt certain was false.⁹⁸

In practice, it is difficult to determine whether a person “knows” that testimony is false. The Model Rules define “knowingly,” “known,” and “knows” as “denot[ing] actual knowledge of the fact in question.”⁹⁹ In the next sentence, the definition continues, stating that “a person’s knowledge may be inferred from circumstances,”¹⁰⁰ effectively softening the meaning of “actual knowledge” to something analogous to reasonable belief. Absent the admission of a witness¹⁰¹ or the lawyer’s own knowledge based on what she perceived, applying this definition affords wide latitude. Assuming knowledge of inaccurate testimony, however, determining the lawyer’s ethical duty is easy. Introducing inaccurate testimony known to be inaccurate, and thus deceptive, is forbidden.¹⁰²

97. *Id.* at 161.

98. *Id.* at 173, 175–76. Justice Stevens underscored the duty of counsel to prevent perjured testimony in his concurring opinion. *See id.* at 190 (Stevens, J., concurring) (“[I]t appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty . . . to take extreme measures to prevent the perjury from occurring.”). No one doubts that this prohibition applies in both civil and criminal cases. In *Committee on Professional Ethics & Conduct of Iowa State Bar Ass’n v. Crary*, the Iowa Supreme Court applied the prohibition on offering false testimony to a lawyer who was sitting second-chair during the defense of a deposition. 245 N.W.2d 298, 299, 307 (Iowa 1976). The facts were sordid: the false testimony concerned the affair the witness was having with the lawyer. *Id.* at 299. Although the court seemed to believe that the lawyer had helped the witness formulate the false testimony, it did not rely on that belief. *Id.* at 305. The lawyer was disbarred for a different reason: he *permitted* his client to testify falsely. *Id.* at 307.

99. MODEL RULES OF PROF’L CONDUCT R. 1.0(f) (2009).

100. *See id.*

101. *See infra* text accompanying notes 179–81.

102. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3). Unless one is talking about a fact that is true by definition, like a mathematical formula, or a matter where one herself is a percipient witness, the line between “belief” and “knowledge” cannot be definitely drawn. *See, e.g.,* Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 142 (2008). As Professor Freedman points out,

the words “know” and “knowledge” have been defined in the Terminology section of the Model Rules in the most restrictive terms. Thus, “knowing” means “actual knowledge,” and the ABA, the American Law Institute, and the courts have all made it clear that a lawyer will rarely “know” about client perjury.

For example, in the words of ABA Formal Opinion 87-353, it will be “the unusual case” where the lawyer “does know” that a client intends to commit perjury. That opinion states that knowing can be established only by the client’s “clearly stated intention” to perjure himself at trial.

Id. Yet, as quoted above, the definition of “knowing” in the Model Rules themselves establishes that “knowledge may be inferred from circumstances.” MODEL RULES OF PROF’L CONDUCT R. 1.0(f). There is no easy touchstone or bright line rule that describes “knowing for sure” and

b. Coaching Witnesses to Testify Falsely

In his extensive discussion of witness coaching, Professor Richard Wydick distinguishes three types of coaching, which he labels Grade One, Grade Two, and Grade Three Witness Coaching.¹⁰³ Grades One and Two, as he describes them, constitute easy cases, and Grade Three constitutes a much easier case than Wydick seems to think.¹⁰⁴ Grade One witness coaching consists of “knowingly and *overtly* induc[ing] a witness to testify to something the lawyer knows is false.”¹⁰⁵ Overt inducement occurs when a lawyer explicitly invites the witness to offer testimony that will enhance the lawyer’s case.¹⁰⁶ Thus, in a case in which it is important to establish the distance between plaintiff (*P*) and defendant (*D*) at the time in question, the lawyer representing *P* says during the preparation of a cooperative, third-party eyewitness: “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?”¹⁰⁷

Grade Two witness coaching consists of *covert* inducement.¹⁰⁸ By this, Professor Wydick means the circumstance in which “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.”¹⁰⁹ Grade Two coaching is also an ethical violation because “the ‘known false testimony’ element is the same as for Grade One.”¹¹⁰

Grade Three witness coaching, according to Wydick, occurs when “the lawyer does not knowingly induce the witness to testify to something the

“being quite certain but . . .” Some lawyers will be confident in saying that they know testimony is false; others may prefer to say that deciding such a question is for the trier of fact.

103. See generally Wydick, *supra* note 11 (explaining Grade One, Grade Two, and Grade Three witness coaching).

104. See *id.* at 37.

105. *Id.* at 18 (emphasis added). For a discussion of what Ms. Salmi terms “conduct that is clearly unethical,” see Salmi, *supra* note 2, at 148. Ms. Salmi includes cases where an attorney “encourage[s] the witness to make untrue statements” and “instruct[s] the witness to claim a lack of memory or knowledge as to any question that the witness does not want to answer.” *Id.* at 148, 150. Presumably, this includes questions that the lawyer does not want the witness to answer. Ms. Salmi’s third category is where an attorney implies to her witness that false testimony can be acceptable. *Id.* at 151. The example she gives draws on an article by Joseph D. Piorkowski, which posits the situation in which a lawyer tells her client that the false testimony will secure the ultimate goal of ensuring a just result—a favorable outcome to the litigation for the deserving party. *Id.* (citing Piorkowski, *supra* note 11, at 402–03). As a fourth category, Ms. Salmi describes a situation that appears ethically closely-related to the second category, namely, where the lawyer “encourages the witness to evade answering a question or to provide evasive answers to questions.” *Id.* at 151–52.

106. See Wydick, *supra* note 11, at 19–20.

107. *Id.* at 20.

108. *Id.* at 25.

109. *Id.*

110. *Id.*

lawyer knows is false, but the lawyer's conversation with the witness nevertheless alters the witness's story."¹¹¹ Wydick believes—mistakenly, as we argue—that such conduct does not violate the ethical rules.¹¹²

Though his analysis has gone unchallenged for a number of years, much of Professor Wydick's account is problematic. Grade Two witness coaching, under his theory, omits an important “easy” case of covert witness coaching, and Grade Three mistakenly suggests that a lawyer does not violate the ethical rules in a circumstance in which she does.¹¹³ Wydick's description of Grade One coaching is the only part that is accurate as it stands; it is an important statement of the easiest case of witness coaching, and a lawyer's duties under Model Rule 3.4(b).¹¹⁴ Grade One dictates that a lawyer may not overtly request that a witness testify falsely for any reason.¹¹⁵ The objective motivation for the inaccurate testimony to strengthen the lawyer's case is trumped by the Anti-False Testimony Principle. Few practitioners doubt that some lawyers ignore the Model Rules and engage in such conduct because they think they can get away with it—a scheme that prompts the memory of Justice Holmes' “bad man” view of the law.¹¹⁶ It is difficult, however, to suppose that any lawyer, even one who is prepared to violate the rule, could doubt that a request for false testimony is highly improper.¹¹⁷

111. *Id.* at 37.

112. *See id.* at 37 n.112 (“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. § 1622 (1994).”); *see also infra* notes 130–40 and accompanying text.

113. *See* Wydick, *supra* note 11, at 37 n.112.

114. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2009).

115. *See id.* (“A lawyer shall not . . . counsel or assist a witness to testify falsely . . .”).

116. O.W. HOLMES, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (“A man who cares nothing for an ethical rule which is believed and practised by his neighbors is likely nevertheless to care a good deal to avoid being made to pay money, and will want to keep out of jail if he can.”).

117. *See generally* Salmi, *supra* note 2, at 148–54 for a discussion of “[c]onduct [t]hat [i]s [c]learly [u]nethical.” Ms. Salmi—referencing Professor Wydick's Grade One coaching—distinguishes four ways in which a lawyer can knowingly and overtly encourage a witness to testify falsely:

[(1)] encourage[ing] the witness to make untrue statements . . . [(2)] instruct[ing] the witness to claim a lack of memory or knowledge as to any question that the witness does not want to answer . . . [(3)] implying the acceptability of false testimony . . . [and (4)] encourag[ing] the witness to evade answering a question or to provide evasive answers to questions.

Id. at 148–54. For a case suggesting that a lawyer can be disciplined for advising a client to avoid volunteering information, *see* Salmi, *supra* note 2, at 153 (discussing *In re Complaint as to the Conduct of A*, 554 P.2d 479, 482 (Or. 1976), in which a lawyer counseled his client to avoid volunteering certain information when the client answered a question about his mother's whereabouts by merely naming a city, concealing the fact that she was buried in that city).

By contrast, Professor Wydick's account of what he designates as Grade Two coaching—covert inducement of false testimony—ignores a critical aspect of this part of the landscape. To many lawyers, the clearest example of covert inducement of false testimony is the instance where a lawyer—by stealth, indirection, or some other form of deception—attempts to induce a witness (1) to doubt a previous memory and substitute one more favorable to the case or (2) to adopt a belief about which he was initially unsure as a clear memory.¹¹⁸ A classic example of such covert inducement occurs when counsel for a plaintiff suffering bodily injury as a result of asbestos exposure manages to persuade her witness that he really did see cartons of the defendant's asbestos product on the factory floor when previously his memory had been hazy. The lawyer does not *ask* the witness to perpetuate false testimony (as in Professor Wydick's example of overt coaching in the first paragraph of this subsection¹¹⁹); to the contrary, she subtly (and effectively) tricks the witness into substituting the lawyer's deceptive account for the witness's own genuine memory.

Such coaching, however, is *not* what Professor Wydick meant when he talked about covert inducement of false testimony—and, as will be shown, his tripartite division of the forms of coaching does not account for it.¹²⁰ Grade Two coaching, according to Wydick, occurs when the lawyer does not explicitly articulate her request for false testimony; rather, she sends a message to the witness by implication.¹²¹ The lawyer conveys the message that a different memory will better serve the case, and the witness understands and responds. The witness in this situation, however, is not tricked. The purpose of proceeding this way, apparently, is to give the lawyer the ability to deny that she requested that a witness testify falsely if the witness declines to cooperate with the lawyer's implied message.¹²² Grade Two coaching is no different from overt inducement of false testimony, except that it gives the lawyer, and possibly the witness, what intelligence operatives call "plausible deniability." It is, in short, ethically equivalent to an improper overt request, but with the built-in defense to a disciplinary charge. Although Professor Wydick is probably correct that these covert or indirect requests for false testimony are less likely to be reported to courts and disciplinary authorities than overt

118. See Applegate, *supra* note 4, at 328–49; see also Salmi, *supra* note 2, at 157–59. Professor Applegate distinguishes a category of witness coaching that Judge Frank calls "inadvertent but innocent witness coaching" from the covert inducement of false testimony. *Id.* at 328 (quoting JEROME FRANK, COURTS ON TRIAL 86 (Princeton Univ. Press 1950) (1949)).

119. See *supra* text accompanying note 106.

120. See Wydick, *supra* note 11, at 18, 25, 37 (introducing Professor Wydick's three grades of witness coaching).

121. *Id.* at 25 (explaining that "covert" inducement "is transmitted by implication").

122. *Id.* at 26 (suggesting that a lawyer may choose to construct false testimony to "save face").

requests for false testimony,¹²³ the lack of ease of detection does not change the violation of the Anti-False Testimony Principle.

Professor Wydick does not mean to include the asbestos/*Celotex* situation, in which the lawyer deceives the witness, in his Grade Two definition of covert inducement. This omission is clear because he deliberately equates the moral culpability of lawyer and witness in both Grades One and Two. He argues that covert inducement witness coaching “is no less harmful than [overt witness coaching] 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.”¹²⁴ Although it is correct that the court’s truth-finding function is undermined equally whether a witness knows he is testifying inaccurately or has been deceived by his lawyer into doing so, it is *not* true that “the morals of the lawyer and witness” are the same in situations in which the witness has been deceived by the lawyer into changing his memory of what he perceived.¹²⁵ To the contrary, where the witness is honestly deceived about the truth of his memories of his perceptions, it is difficult to criticize him morally at all. This view is consistent with the requirement that to commit perjury, a person must knowingly testify falsely.¹²⁶ On the other hand, where the witness and the lawyer are jointly engaged in a verbal game to maintain plausible deniability about their efforts to present inaccurate testimony to the court, their moral culpability is, as Professor Wydick asserts, the same.¹²⁷ By equating the moral culpability of both lawyer

123. *Id.* at 27. The basis for this assumption is probably that covert requests would be less likely to be reported because of insufficient evidence; a witness offended by his feeling that his lawyer made an improper request would not have an explicit statement of improper nature to which he could point. A witness in this situation may be more inclined to ignore the exchange rather than report it.

124. *Id.* (emphasis added).

125. *See id.* A witness who knowingly testifies inaccurately is morally culpable. A witness who is deceived into doing so by his lawyer is not. Wydick also thinks that the two types of coaching vary on ease of detection. *Id.* Whether the examination is that of an opponent in a deposition or of a witness on cross-examination at trial, the witness who believes himself to be telling the truth may be better able to withstand questioning that challenges his interpretation than one who is lying, for the simple reason that he genuinely believes that his testimony relays accurate memories of his perceptions. A dishonest witness, on the other hand, faces the problem of knowing the extent to which he needs to perjure himself in order to keep his story consistent.

126. *See* 18 U.S.C. §§ 1621–22 (2006).

127. *See* MODEL RULES OF PROFESSIONAL CONDUCT R. 1.4(a)(5) (2009) (requiring that a lawyer “consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law”); *see also id.* at R. 4.1 (mandating “[t]ruthfulness [i]n [s]tatements [t]o [o]thers”). In accordance with these rules, a lawyer owes her client a duty of candor—a duty, of course, that extends to a witness who is the lawyer’s client solely for the purpose of preparation for and defense of a deposition. A reading of the Model Rules shows that there is a substantial moral difference between the lawyer in the asbestos/*Celotex* case and the lawyer in Professor Wydick’s Grade Two coaching hypothetical. The lawyer who asks her witness to help out with false

and witness, Professor Wydick fails to include in his definition of Grade Two coaching the circumstance in which the lawyer manipulates an unassuming witness into testifying inaccurately.

Nevertheless, it is clear that covert inducement of false testimony presents an easy case, whether it is defined as Professor Wydick's Grade Two coaching or to include the more subtle, but equally deceptive, coaching described above. A lawyer acts improperly when she tries to induce false testimony, whether she does so with or without an overt request and whether or not the witness understands what the lawyer is doing.¹²⁸

2. *Easy (But Not Quite So Easy) Cases*

a. *The Lawyer Induces the Witness to Change His Story Without Knowing the Altered Testimony Is False*

Professor Wydick describes what he calls Grade Three witness coaching as follows:

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 subordination of perjury. 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.¹²⁹

Professor Wydick argues that while Grade Three witness coaching "interfere[s] with the court's truth-seeking function," the lawyer who practices it is nevertheless not subject to discipline under Model Rules 3.3(a)(3) or 3.4(b) when she induces her client to change his testimony.¹³⁰ Wydick bases his Rule 3.4(b) argument on the language of the Rule that bars a lawyer from

testimony violates both the Rules of Professional Conduct and criminal law, whether she does it overtly or in such a way as to preserve plausible deniability. *See* Wydick, *supra* note 11, at 18 n.48 (discussing a lawyer's culpability for suborning perjury under federal perjury statutes). At least in this case, however, the lawyer is not attempting to *deceive* the witness. Where the lawyer tries to manipulate the witness into believing an account of the historical record that the lawyer knows is false, the lawyer is acting dishonestly toward both the court and her client.

128. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b).

129. Wydick, *supra* note 11, at 37.

130. *Id.* at 37 n.112. At the time Professor Wydick wrote his article, the requirement now contained in Rule 3.3(a)(3) appeared in Rule 3.3(a)(4); the enumeration was changed in the 2002 revisions. *See* MODEL RULES OF PROF'L CONDUCT REPORTER'S EXPLANATION OF CHANGES R. 3.3 text n.3 (2009).

“counsel[ing] or assist[ing] a witness to testify falsely.”¹³¹ Wydick’s argument is that when a lawyer induces a witness to alter his story, she violates the Model Rule 3.4(b) if, and only if, she knows that the alteration is false.¹³² On its face, this is quite incongruous for two reasons: First, as Professor Wydick concedes, when a lawyer alters a “witness’s story,” that conduct “interfere[s] with the court’s truth-seeking function.”¹³³ Second, it allows a lawyer to defend against charges of misconduct by asserting that although she altered the record and did not know whether the alteration was true, she did not *know* that the alteration was false. This contradicts common sense and the underlying thrust of the ethical rules, because it permits a deviation from the historical record but fails to hold the lawyer to her duty of ensuring that the modification is true. Speaking directly to lawyers, and contrary to Wydick’s approach, one commentator advised that “[o]ne ethical rule of thumb is, never suggest unrecalled details of a relevant event that are anything other than what you believe to be true.”¹³⁴ This is the correct approach. A lawyer can suggest alterations to a witness’s story only when she reasonably believes the alteration is true. She cannot escape violation of the Anti-False Testimony Principle on the ground that she did not know her proposed alteration was false.

Professor Wydick’s interpretation of Model Rules 3.3(a)(3) and 3.4(b) mocks one of the critical goals of the Anti-False Testimony Principle: to present the court with a factual record that is as accurate as possible. A slight modification of the hypothetical testimony used by Professor Wydick to identify Grade One witness coaching illustrates the incongruity of his conclusion. In Wydick’s example, a lawyer asks a witness to testify that, at a relevant time and place, *P* and *D* were fewer than 100 yards apart.¹³⁵ In the first formulation of the example, the lawyer asks the eyewitness—who is *P*’s best friend—if he was in a position to observe the distance between the parties.¹³⁶ When the witness answers in the affirmative, the lawyer says: “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?”¹³⁷

131. See *infra* text accompanying notes 154–60 for a discussion of how this interpretation ignores a clause in the text of Rule 3.4(b), which permits easy avoidance of this apparent paradox.

132. See MODEL RULES OF PROF’L CONDUCT R. 3.4(b).

133. Wydick, *supra* note 11, at 37.

134. Altman, *supra* note 12, at 41. Although Professor Wydick’s description of Grade Three coaching refers only to seeking testimony that the lawyer knows is false, his description of “conversation[s] . . . [that] alter[] the witness’s story” as “coaching” makes it clear that he is not talking about inadvertent comments by the lawyer that could alter testimony. Wydick, *supra* note 11, at 37. The lawyer’s duty to avoid even such inadvertent changes in the witness’s testimony is encompassed by the approach set forth at the end of this subsection. See *infra* text accompanying notes 156–60.

135. Wydick, *supra* note 11, at 19.

136. *Id.* at 19–20.

137. *Id.* at 20.

The witness agrees to so testify.¹³⁸ Although Professor Wydick describes this as an improper (Grade One) overt inducement of false testimony, the request only falls into Grade One on the *assumption* that the testimony is false.¹³⁹ If the testimony is false, the impropriety of the lawyer's conduct is clear.¹⁴⁰ The position is different, however, if the witness's testimony is true.

Let us consider two variations of Professor Wydick's scenario. Suppose, first, that when the witness says he can help the lawyer with his testimony, he does so because what the lawyer wants him to say is what he truthfully can say. In this case, the witness replies to the lawyer's request for help: "Of course I can say they were less than 100 yards apart, because that's the way I saw it." Here, although the lawyer may have been indifferent to her ethical obligations, she has committed no violation, because the witness will, in fact, testify truthfully, based on his memory of what he saw.¹⁴¹ Though the lawyer may have been willing to deceive the court, the witness's testimony is not deceptive because it honestly is accurate.

A second variation is more difficult and identifies the problem in Professor Wydick's formulation of Grade Three coaching. Suppose, here, that following her request for testimony that the distance between *P* and *D* was less than 100 yards, the lawyer says: "I don't care whether it's true or false. I only want you to say it." Under Professor Wydick's approach, the lawyer has not committed a violation because the lawyer does not know for certain that the testimony is false.¹⁴² This is not correct. Professor Wydick's approach is deficient because it suggests that a lawyer has no duty to ascertain whether the changes in testimony are accurate or not. What matters in assessing the lawyer's conduct, however, is not that she *knows* the testimony she is seeking to elicit is false, but rather that she is trying to alter the factual record. Such alteration, in itself, may cause the witness to present inaccurate testimony to the court.¹⁴³ Expressing indifference as to whether the statement is true or false, the lawyer shows her own indifference to her obligation to offer correct information in the record. Failing to know that the testimony is false does not excuse her conduct.

Let us step back for a moment because this is a critical issue. Lawyers are free to discuss the factual record with their witnesses.¹⁴⁴ They are not required

138. *Id.*

139. *See id.* at 18.

140. *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2009).

141. *See id.*; *see also* Wydick, *supra* note 11, at 19–20.

142. *See* Wydick, *supra* note 11, at 37.

143. *See* Altman, *supra* note 12, at 41 (noting that refreshing the recollection of the witness during witness preparation may result in "seemingly flawless trial testimony" that "was not part of the witness's initial memory").

144. *See* Applegate, *supra* note 4, at 304 ("In preparing a witness, a lawyer usually discusses with the witness the factual context into which the witness's observations or opinions fit.

to be passive receptors of what their witnesses say.¹⁴⁵ Lawyers are therefore entitled to speak with witnesses and, implicitly, to alter what the witness would have said absent the discussion with the lawyer. Such conversations may occur, provided—and this is a critical proviso—that the alteration does not produce testimony that is inaccurate and that the lawyer either knows it is inaccurate or has not taken the trouble to verify its truth.¹⁴⁶ In short, lawyers are not precluded from helping their witnesses better articulate their testimony about their own perceptions. As Ms. Salmi explains: “A witness’s perceptions of critical events are easily eroded and distorted with time. Witness preparation should therefore help revive the witness’s memory.”¹⁴⁷

The United States Court of Appeals for the Fifth Circuit has gone so far as to say that a lawyer does nothing wrong when she tries, “even aggressively,” to persuade her witness that his initial recollection of the facts is not entirely “complete or accurate.”¹⁴⁸ It would be foolish to suppose that lawyers do not regularly engage in such discussions with their witnesses. Our point, rather, is that if lawyers are aware of their obligations under the Anti-False Testimony Principle to avoid deceiving the court about the historical record, such discussions are not unethical.

The correct rule governing such discussions with witnesses is more restrictive than Professor Wydick’s Grade Three coaching. That rule is that it is the lawyer’s duty to ensure that any alteration in the testimony that the witness is prepared to give is one that the witness believes is truthful.¹⁴⁹ While it is certainly correct that a lawyer must avoid coercion,¹⁵⁰ this does not describe her entire obligation. The lawyer must emphasize and re-emphasize to the witness that the court is entitled to hear—and she, as counsel, has a duty to present—only evidence that is accurate.¹⁵¹ Thus, in discussing alterations of

Lawyers frequently inform witnesses of facts of which they were previously unaware by telling the witnesses directly or by comparing the testimony of witnesses possessing similar knowledge. There are compelling reasons for informing a witness of other views, and most commentators do not question the practice.” (citation omitted).

145. See *infra* text accompanying notes 194–96 for a discussion of this point in connection with a lawyer’s suggesting alteration of a witness’s choice of words to describe the witness’s perceptions.

146. Altman, *supra* note 12, at 39 (“To perform witness preparation ethically, you still must evaluate the truth of the witness’s prospective testimony.”).

147. Salmi, *supra* note 2, at 157.

148. See *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir. 1993); see also Altman, *supra* note 12, at 40 (discussing *Resolution Trust*).

149. See Altman, *supra* note 12, at 39 (emphasizing the importance of evaluating the truthfulness of testimony).

150. See *id.* (highlighting the importance of avoiding coercion).

151. See *id.* (“Instructing the witness to tell the truth sets the stage for ethical witness preparation. It helps build rapport with the witness by presenting [the lawyer] as a truth-seeking professional who will not require anything unlawful, unethical, or beyond the witness’s capacity.”)

potential testimony, the lawyer must respect the witness's right to disagree¹⁵² and must defer to the witness where he indicates that he cannot truthfully say what the lawyer wishes he could say.¹⁵³ A lawyer is not excused from attempting to alter testimony merely by "not knowing" that the altered testimony is false, as Professor Wydick suggests.¹⁵⁴ She is justified in permitting testimony to go forward if—and only if—she has met the burden of establishing that the witness genuinely believes that any suggested changes in his testimony are accurate and thus will not interfere with the court's truth-seeking function. In short, such testing of a witness's version of events promotes a back and forth that helps the lawyer to engage in the kind of truth-detecting that the duty to investigate ethically requires.¹⁵⁵

In addition to avoiding incongruous results, this approach is consistent with Model Rule 3.4(b) and its mandate that "a lawyer shall not . . . falsify evidence."¹⁵⁶ This prohibition applies equally to both documentary (or other tangible) evidence and to witness testimony.¹⁵⁷ Model Rule 3.4(b) fills the gap (into which Professor Wydick fell¹⁵⁸) that appears to prevent a lawyer from inducing a witness to alter his testimony only if the lawyer *knows* the testimony is false.¹⁵⁹ A lawyer who alters a document does not necessarily make it "false." She simply changes it and, thereby, "interfere[s] with the court's truth-seeking function."¹⁶⁰ Only where the lawyer can establish to her honest satisfaction that an alteration in a witness's testimony does not "change" the testimony such that it ceases to be accurate can the lawyer participate in or permit the introduction of such altered testimony.¹⁶¹ Unless

152. See *Resolution Trust*, 6 F.3d at 342 (noting with approval the attorneys' practice of permitting their witness to sign an affidavit only if the witness agreed with its contents).

153. See Altman, *supra* note 12, at 39 (advocating the practice of "requiring the witness[] to reject any of the attorney's suggestions that would, in the witness's view, result in false testimony").

154. See Wydick, *supra* note 11, at 37.

155. See, e.g., Altman, *supra* note 12, at 39 ("At a minimum, ethical witness preparation is a dialogue framed by the[] joint obligations [of both lawyer and witness to ensure truthful testimony].").

156. MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (2009).

157. See *id.* Rule 3.4(b) prohibits both falsification of evidence and assistance to witnesses "to testify falsely." *Id.*

158. See Wydick, *supra* note 11, at 37 n.112 (asserting that a violation of Rule 3.4(b) does not occur when the lawyer does not know the testimony is false). Professor Wydick fails to account for the entire Model Rules' definition of "know," specifically the sentence indicating that "[a] person's knowledge may be inferred from the circumstances." MODEL RULES OF PROF'L CONDUCT R. 1.0(f). Indeed, a lawyer's knowledge may be inferred, and as such, lacking actual knowledge of false testimony will *not* save a lawyer from a Rule 3.4(b) violation.

159. See MODEL RULES OF PROF'L CONDUCT R. 3.4(b).

160. Wydick, *supra* note 11, at 37.

161. See Altman, *supra* note 12, at 39.

the lawyer can so satisfy herself, it is an easy case: such conduct violates the Anti-False Testimony principle and is inappropriate.

b. The Lawyer Believes the Witness Means to Tell the Truth but the Lawyer Knows the Testimony Is Wrong

A less common case occurs when (1) the lawyer herself has not intentionally engaged in any overt or covert efforts to alter the witness's memory; (2) the witness *is* recounting his memory of the events to which he is testifying as he really remembers them, and the lawyer knows this; but (3) based on other evidence, the lawyer strongly believes that the witness is factually mistaken.¹⁶² If the lawyer presents the witness's testimony, does she violate Model Rule 3.3(a)(3) by offering false testimony? One recent commentator seems to maintain that a lawyer may offer evidence that she believes to be erroneous, at least in the criminal defense context, provided that the witness genuinely believes his testimony is accurate.¹⁶³ While it is beyond the scope of this Article to discuss whether this is a proper approach for a criminal defense lawyer, we think that when applied in a civil context, such conduct creates an easy case—it violates the Anti-False Testimony Principle.

According to Professor Margaret Raymond, “[a]s a matter of criminal defense ethics” it may be appropriate to offer “mistaken alibi testimony, which is truthful but erroneous, to create reasonable doubt.”¹⁶⁴ As her only support for this proposition, Professor Raymond cites *James v. Illinois*, a murder case in which a defense witness testified, apparently on her honest belief, to a proposition that defense counsel knew to be wrong.¹⁶⁵ In *James*, the defendant made a statement to the police explaining that he had his hair color and style changed at his mother's beauty parlor after the killing but before his arrest; the trial court later suppressed this statement as the product of an improper arrest in violation of the Fourth Amendment.¹⁶⁶ Notwithstanding knowledge of this statement, defense counsel introduced an alibi witness at trial who testified that on the day of the crime, the defendant's hair color was as it appeared in court (black), and not the color (red) that five eyewitnesses testified was the color of the murderer's hair.¹⁶⁷ The question before the United States Supreme Court

162. See Applegate, *supra* note 4, at 309 (characterizing such testimony as “objectively false but subjectively true testimony”).

163. See Margaret Raymond, *The Problem With Innocence*, 49 CLEV. ST. L. REV. 449, 458 (2001) (noting as acceptable the practice of allowing testimony that is “truthful but erroneous” in order to cast reasonable doubt).

164. *Id.* at 458. In a footnote, Professor Raymond takes a stronger view, stating that a defense lawyer is “obliged to” present such testimony, provided that she does not know the testimony is untruthful. *Id.* at 458 n.38.

165. *James v. Illinois*, 493 U.S. 307, 310 (1990).

166. *Id.* at 309–10.

167. *Id.* at 310.

was not the propriety of the alibi witness's testimony, but rather whether the defendant's suppressed statement could be used to impeach the testimony of the eyewitnesses.¹⁶⁸ Overruling the Supreme Court of Illinois, the United States Supreme Court held in a five to four decision that the suppressed statements could not be used to impeach witnesses other than the defendant himself.¹⁶⁹ Although the majority did not address the issue, Justice Kennedy suggested in his dissent that the introduction of such testimony was improper because "[e]ven if the witness testifies in good faith, . . . his lawyer, who offer[ed] the testimony, kn[ew] the facts."¹⁷⁰

Professor Raymond criticizes the dissent's view on the ground that it "disregards the possibility that the testimony, while factually incorrect, was nonetheless truthful, perhaps the product of mistaken recollection. As long as the testimony was not known by the lawyer to be untruthful, counsel was not only entitled to test the government's proof, he was obliged to."¹⁷¹ By her use of the word "truthful," Professor Raymond appears to say that "truthful[ness]" is determined solely by the subjective mental state of the witness—an examination of the witness's intent, rather than the objective accuracy of the statement. Thus, if the witness was truthful—not intending to lie—on his subjective criterion, criminal defense counsel can and must present the testimony even if (1) the testimony is, in fact, inaccurate, and (2) the lawyer knows that the testimony is inaccurate.

Whatever particular rules may apply to a lawyer representing a criminal defendant, we think it clear in the civil context that such conduct would be unethical.¹⁷² The general purpose of the Anti-False Testimony Principle, and of Model Rule 3.3(a)(3) in particular, is to ensure that the court receives an accurate record on which to decide the case.¹⁷³ Of course, testimonial accounts from different witnesses may vary, even if all witnesses are testifying to their honest beliefs and memories, because people perceive and remember what they perceive differently. Yet, Professor Raymond's interpretation does not

168. *Id.* at 313.

169. *Id.*

170. *Id.* at 326 (Kennedy, J., dissenting).

171. Raymond, *supra* note 163, at 458 n.38. Note that this is different from Professor Wydick's Grade Three formulation, criticized above. See *supra* text accompanying notes 134–42. Wydick focused on whether the testimony itself was, in fact, inaccurate; Professor Raymond would excuse the lawyer even if the lawyer believed that the witness was honestly mistaken. See Raymond, *supra* note 163, at 458 n.38; Wydick, *supra* note 11, at 37.

172. As indicated, the *James* Court decided the question of the propriety of introducing suppressed statements made by the defendant to impeach witnesses other than the defendant. See *James*, 493 U.S. at 313. *James* did not decide that a criminal defense lawyer may introduce testimony she knows to be inaccurate, nor did the majority opinion contain dicta that supported that claim. Professor Raymond's article cites no authority that supports the argument that a criminal defense lawyer may present testimony to the tribunal that she knows to be inaccurate.

173. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2009).

comport with Model Rule 3.3(a)(3).¹⁷⁴ The language of Model Rule 3.3(a)(3) bars a lawyer from “offering evidence that the *lawyer* knows to be false.”¹⁷⁵ The focus is on the lawyer’s knowledge, not the mental state of the witness; the rule applies whether the witness is honest, dishonest, deluded, or mistaken, for the rule imposes a duty on lawyers, not their clients.¹⁷⁶ Because the Rule’s purpose is to ensure that lawyers do not participate in placing testimony that they *know* is inaccurate before the court, the good faith of a witness does not alter that duty, nor does it undercut its rationale.¹⁷⁷ It is not relevant that our moral assessment of a witness who mistakenly provides false testimony will be quite different from that of a witness who does so intentionally.

The critical focus, therefore, must be on the lawyer’s knowledge: if she knows the testimony is false, it is an easy case—she cannot present the testimony. The proper procedure when a lawyer knows that her witness is honestly mistaken, therefore, is the same as when the lawyer believes that the witness is lying: the lawyer must remonstrate with the witness.¹⁷⁸ Where the witness believes he is telling the truth, as was the case in *James*,¹⁷⁹ the lawyer must confront the witness with the evidence that has convinced the lawyer that the witness’s perception or memory is inaccurate.¹⁸⁰ If the witness’s account *genuinely* persuades the lawyer that the witness’s version of the story may be accurate, only then may the lawyer present the testimony with the view that if the case goes to trial, it will be for the jury to decide the disputed question of fact.¹⁸¹

c. A Lawyer Uses Her Right to Explain the Applicable Law to Her Client to Procure False Testimony

At the core of the lawyer’s duty to communicate with her client is the duty to discuss and explain the applicable law to the client.¹⁸² Such an explanation is a predicate to the lawyer’s ability to fulfill her responsibility to render legal advice to the client. Nevertheless, there are circumstances where the manner in which the lawyer explains the law to the client, as well as the *timing* of such an

174. *See id.*; *see also* Raymond, *supra* note 163, at 458 n.38.

175. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (emphasis added).

176. *Id.* (“A lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.”).

177. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 8.

178. *See, e.g., Nix v. Whiteside*, 475 U.S. 157, 169 (1986) (“It is universally agreed that at a minimum the attorney’s first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct.”).

179. *See supra* notes 166–69, 178 and accompanying text.

180. *See, e.g., Nix*, 475 U.S. at 169 (ruling that a lawyer must “attempt to dissuade” her client when she suspects the client may offer false testimony).

181. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3).

182. *See id.* at R. 1.2(d) (outlining an attorney’s role in counseling her client to “make a good faith effort to determine the validity, scope, meaning or application of the law”).

explanation, is inappropriate. A lawyer cannot shroud her improper and covert attempt to alter a witness's testimony about the historical record by claiming that it is her duty to render legal advice to her client.¹⁸³ By doing so, she infringes upon the Anti-False Testimony Principle to the extent that her discussion of the applicable law covertly induces the witness to say he remembers what he would not have otherwise remembered but for his recently obtained knowledge of the applicable law. The same is true regarding the lawyer's ability to coach the witness covertly by the way she explains the facts of the litigation.

This problem is highly textured. Some client-witnesses are more sophisticated than others and will recognize more readily from the lawyer's discussion of the law what they "need to say" to prevail. Regardless of how much the lawyer emphasizes the requirement that the witness tell the truth, some client-witnesses will be more willing to lie to enhance their case than others. Finally, some legal questions—and the facts needed to resolve such questions—are more complex than others. One commentator discusses the least problematic iteration of the issue. Focusing on asbestosis personal injury litigation in which the witness is generally less sophisticated than the typical in-house deputy general counsel of a corporation, Liisa Renée Salmi discusses an attorney's "lecture on the law," which may "suggest" to the witness what his testimony should be.¹⁸⁴ In her analysis, the critical issue is whether the lawyer delivers her lecture before the witness has recounted the facts—which may prompt the witness to mold his story to fit his understanding of the law—or after, when the witness's story already is "set."¹⁸⁵ Ms. Salmi cites an ethical opinion of the Nassau, New York Bar that establishes the rule that the lawyer may discuss applicable law with the client before hearing his version of the facts "as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence."¹⁸⁶ As Ms. Salmi correctly points out, however, "even an attorney acting in good faith really cannot know how her lecture on the law will alter the witness's story if she gives the lecture before she knows the facts."¹⁸⁷

Although this view may plausibly describe the relationship between lawyer and litigant in a personal injury action where the result turns on the account of a few discrete historical events, it fails to capture the dynamics between lawyer and client or, in more complex matters, between lawyer and multiple

183. *See id.*

184. Salmi, *supra* note 2, at 154–56 ("[T]he asbestos litigant is most likely a factory worker who does not fully know what the manufacturers actually did.").

185. *Id.* at 154–57 (describing this issue as one that creates "borderline" ethical issues); *see also* Altman, *supra* note 12, at 41 ("One ethical rule of thumb is, never suggest unrecalled details of a relevant event that are anything other than what you believe to be true.").

186. *Id.* at 157 (quoting Nassau Bar Ethics Op. No. 94-6 (1994)).

187. *Id.*

representatives of a corporate client. In these cases, few lawyers view their discussions with such clients as giving them cut-and-dry lectures on the applicable law; rather, these discussions are more closely equated to back-and-forth conversations, seeking active client input. As we will discuss in detail below, when lawyers work with their clients to formulate understandings that dovetail with appropriate legal positions,¹⁸⁸ lawyers in commercial and especially complex cases do not render legal advice by giving the client a lecture. Instead, the lawyer's advice is the product of sustained attorney-client dialogue, which sometimes continues through discovery as the other side's position becomes known.

Thus, suppose that an insurance company is a defendant in a bad-faith tort action. While the claims executives and claims handlers are likely to have a general understanding of what a bad-faith action is, they may lack specific knowledge of the elements needed to defend such an action in the relevant jurisdiction. The lawyer may explain the standard of conduct required under applicable law and then discuss with potential witnesses their actions and their motivations for these actions. The client may respond to the lawyer's initial comment by asking a question that focuses on particular conduct. Simply stated, in such a case, admonishing counsel to listen to the client's story *before* discussing the law is unrealistic. Lawyer-client dialogue, especially when clients are corporations or other sophisticated consumers of legal services, is neither simple nor a one-way street. The idea that a lawyer can discuss the law with her client at any time—provided that she acts in good faith and refrains from creating factually inadequate testimony—may be a useful after-the-fact standard for a disciplinary proceeding where a judicial body must decide whether someone was acting in good faith. The good-faith standard is not, however, adequate as an ethical guideline for practitioners.

Lawyers require an ethical guideline that indicates to their witnesses that telling the truth is essential. When lawyers are discussing the applicable law with their witnesses, when they are discussing the facts, or when they are engaging in any other aspect of witness preparation, sound practice requires lawyers to emphasize at the outset—and repeat as preparation goes forward—that telling the truth is critical, that the lawyer herself insists upon it, and that not telling the truth is not an option. In so doing, the lawyer clearly establishes the ethical landscape for her client and signals to that client that he should never assume that the lawyer is indirectly trying to induce inaccurate testimony.¹⁸⁹ Articulating this ethical framework has an auxiliary benefit for the lawyer herself; lawyers frequently have the ability (though not the right)

188. See Part V.C.1.

189. See Altman, *supra* note 12, at 39 (“Instructing the witness to tell the truth sets the stage for ethical witness preparation. It helps build rapport with the witness by presenting you as a truth-seeking professional who will not require anything unlawful, unethical, or beyond the witness's capacity.”).

knowingly to manipulate their clients into providing favorable accounts of the historical record, and they can also unknowingly practice self-deception. An admonition to clients that truth-telling is essential may also serve to remind the lawyer herself that although she may prefer a different historical record in order to construct a stronger case, the record exists as it is, and she cannot properly interfere with its honest presentation. Doing so would be an unequivocal violation of her ethical duty.

Discussions with clients describing the legal landscape of their case may thus present a situation that is almost as easy an ethical case as efforts to procure inaccurate testimony or to present false evidence. Just as lawyers are flatly precluded from falsifying the factual record,¹⁹⁰ lawyers may not attempt falsification by the indirect route of describing the applicable law in the hope or expectation that witnesses will discern the strongest testimony on their own.¹⁹¹ In most jurisdictions, the values encompassed in the attorney-client privilege and the duty of confidentiality¹⁹² are trumped by the lawyer's duty of candor to the court.¹⁹³ Similarly, the values encompassed by the Anti-False Testimony Principle trump the lawyer's duty to render legal advice to her client. Lawyers have the duty to advise their clients on the applicable law, but even with the strongest will in the world, supported by repeated admonitions that false testimony is unacceptable, a lawyer cannot avoid the presentation of false testimony by an intelligent and manipulative client who will employ his lawyer's advice to build an account of the historical record that will make his, or his company's case, more persuasive. It is easy to assert that the lawyer cannot use her duty to render legal advice to procure false testimony; however, it may be difficult in the real world for a well-intentioned lawyer to be certain that her advice is not being used for that inappropriate end. Indeed, the principle is easy; the application may be difficult.

3. A Hard Case: Limitations on How Far a Lawyer May Go in Discussing a Witness's Word Choice

Words matter. At the most basic level, because different words generally have different meanings, a change in word choice can change meaning. Sometimes the change in meaning can render proposed testimony inaccurate. Words have color or nuance that may not change the strict meaning of the word, but may instead affect the sense of what happened, which, as every trial

190. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2009).

191. See Salmi, *supra* note 2, at 156–57.

192. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (articulating the standards by which a lawyer shall keep information confidential).

193. See *id.* at R. 3.3. In the District of Columbia, the reverse is true. A lawyer has a duty to correct a material misstatement of law or fact “unless correction would require disclosure of information that is prohibited by Rule 1.6.” D.C. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2009) (emphasis added).

lawyer will attest, can affect what the jury will decide.¹⁹⁴ In a products liability case where fatalities or serious injuries occurred after an airplane crashed, for example, the plaintiffs' lawyer will likely want to describe the event as a "crash," or a "disaster," while counsel for the defendant-manufacturer will try to use words such as "accident" or "mishap." Further, apart from jury perception, the choice of words with the same apparent meaning but different nuance can affect the content of a witness's description of observed facts. As Professor Wydick notes, "[s]uggestive questions can produce . . . 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."¹⁹⁵ For this reason, a lawyer's suggestion that a witness alter his choice of words can amount to (covert) efforts to procure inaccurate testimony.¹⁹⁶

The extent to which a lawyer may suggest that the witness alter his choice of words to describe his perceptions presents a difficult ethical question. In such a case, the lawyer is explicitly trying to change her witness's testimony. The question is whether the change alters the baseline description of what was perceived—the correspondence to the witness's genuine memory of the facts he perceived—in a way that compromises the court's truth-seeking function. Is an airplane *crash* the same as an airplane *accident*? Is *hitting* a car the same as *smashing into* a car? Is the testimony about the "underlying reality" different? Is one description closer to the verifiable fact than the other? The answer is both yes and no. Clearly, most counsel have preferences regarding word choice, because they think their suggestions may tilt the case in their clients' direction, even if only marginally.

To understand the delineation between a lawyer's ethically appropriate and ethically inappropriate efforts to alter a client's word choice in his description of past events, it is important to bear the following distinction in mind. The applicable rules themselves forbid *false* testimony in the sense of deceptive inaccuracy.¹⁹⁷ Thus, where the testimony concerns the historical record, the rules only require that lawyers not interfere with witness testimony about their actual memories of what they perceived, such that the report of those perceptions would be inaccurate. The rules from which the Anti-False Testimony Principle is derived do not require that the witness's *own* word choice describing the memories of those perceptions be treated as sacred. In other words, the underlying reality of what was perceived and the words used to describe that reality need not be perfectly congruent.

194. See Salmi, *supra* note 2, at 160 ("[M]any legal scholars are concerned with how an attorney's suggested word choice can affect the jury's perception of the testimony.")

195. Wydick, *supra* note 11, at 10.

196. See Salmi, *supra* note 2, at 160–63.

197. See MODEL RULES OF PROF'L CONDUCT R. 3.4.

Concerning the nature and amount of evidence available for the court, there is nothing wrong with a lawyer doing everything possible to improve the client's chance of winning, provided that "everything" does not include falsifying evidence. Indeed, that is one of the essential principles of advocacy. To call a simple fender-bender a "crash" may be impermissibly stretching a description, but to label a collision that caused significant personal injury and property damage a "crash" probably is accurate. It is a mistake to seek more certainty in a subject than the subject permits, as Aristotle warned long ago.¹⁹⁸ That same admonition is applicable here, yet there is no bright line that will invariably delineate what lawyers can and cannot do in these situations. It is logically impossible to state in the abstract where a change of words falsifies testimony and where it does not. Instead, the crucial question that must always be considered is whether the change falsifies testimony such that the truth-seeking function of the court is compromised. That is why this is the difficult question.

The appropriate solution lies in the dialogue between attorney and client, and, more particularly, in the structure of that dialogue. Lawyers and their clients should interact with one another not simply to try to win the case (or secure the best settlement possible in a bad case), but as partners seeking the best possible outcome that is permitted while acting with integrity. The appropriate way to define the dialogue is by establishing a truth-telling ground rule for testimony. To reiterate what one practitioner succinctly said: "Instructing the witness to tell the truth sets the stage for ethical witness preparation. It helps build rapport with the witness by presenting you as a truth-seeking professional who will not require anything unlawful, unethical, or beyond the witness's capacity."¹⁹⁹ Constrained by the rule that lawyers must convey to their clients that *untruthfulness* is *never* a legitimate option,²⁰⁰ lawyers should discuss with their clients whether changing the client's word choice is consistent with truth-telling. Only the witness can know whether the word change accurately describes his perception, and thus he—not the lawyer—must make the final decision about changing the language.

Suppose that a client is about to be deposed in an automobile accident case in which he is the plaintiff. In telling his story in the preparation meeting, the client describes the events as "the accident." The savvy plaintiffs' lawyer asks, "Would you say that it was a collision?" "Well, sure," replies the witness. "Our two cars did collide." At this point, the lawyer may ask: "Would you be comfortable calling this a collision?" If the witness says "yes," it is difficult to

198. ARISTOTLE, THE NICOMACHEAN ETHICS 3 (Sir David Ross trans., Oxford Univ. Press 1998) (1925) ("[I]t is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits . . .").

199. Altman, *supra* note 12, at 39. Elsewhere, Mr. Altman describes this approach as an "appeal to the witness's commitment to the truth." *Id.* at 42.

200. See *supra* text accompanying notes 26–30.

question the lawyer's behavior from an ethical standpoint. The witness saw what he saw and has been reminded that he is obligated to testify truthfully to what he remembers. He can (and must) testify to what he remembers perceiving—for example, what his eyes saw, what his ears heard, and the way his brain processed the sense data. The word choice *describes* what the witness perceived, but it is not actually *what* he perceived. If he believes that the word “collision” accurately reports what he remembers perceiving, his testimony is not false. There is rarely, if ever, a single, unique word that precisely describes each perception. That is simply not the way language works.²⁰¹ If the witness in our automobile hypothetical is comfortable with describing the “accident” as a “collision,” he may so testify. He is telling the truth and his lawyer has not asked him to do otherwise.²⁰²

Suppose, however, that the lawyer takes her effort to “improve” the testimony one step further. Suppose that she asks the witness whether he would be willing to describe the event as a “crash.” The witness tells the lawyer that he isn't comfortable with her suggestion. Although there may not be a *single* unique word or phrase that the witness believes could alone describe his (memory of his) perception, this does not mean that *any* word chosen by a person who did not share the perception would seem right to the witness.²⁰³ Where the witness declines the lawyer's suggested wording, the lawyer must respect the witness's statement and defer to his word choice.²⁰⁴

A 1979 District of Columbia Bar Legal Ethics opinion emphasizes that notwithstanding the overriding principle that while “a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading . . . a lawyer may properly suggest language as well as the substance of testimony.”²⁰⁵ The opinion distinguishes between testimonial

201. See L.S. VYGOTSKY, *THOUGHT AND LANGUAGE* 124–25 (Eugenia Hoffman & Gertrude Vakar trans., MIT Press 1979) (1962) (discussing the relationship between thought and speech).

202. See Hodes, *supra* note 11, at 1364 (“Suppose, then, that suggestions from counsel enhance the *effectiveness* of the witness's communication, *without* enhancing its accuracy. So long as the material eventually presented is still truthful, and at least not *less* accurate than the pre-horseshedding version, why should that be beyond the bounds of the law?”).

203. Note, of course, that we are talking about one witness. Another person may also have seen the accident, and that person might be willing to use a word that the first eyewitness would not wish to use. Both witnesses may have seen the same event, but each has his or her own individual perception—and a sense of what word fairly and honestly captures it.

204. See *supra* notes 152–53 and accompanying text. While it probably would not violate Rule 3.4(b)'s prohibition against falsifying evidence or assisting a witness to testify falsely to inquire *why* the witness is unwilling to follow the lawyer's suggestion, such inquiries go too far where they violate the premise that, at the end of the day, the witness must testify to his perceptions, in whatever language he—and not his lawyer—chooses to describe them. See *id.*

205. D.C. Bar Op. No. 79, at 138 (1979). Continuing, the Legal Ethics Committee opined that “the particular words in which testimony . . . is cast . . . has no significance *so long as the substance of that testimony is not . . . false or misleading.*” *Id.* at 139 (emphasis added); see also Salmi, *supra* note 2, at 161 (stating that an attorney “may ethically instruct her witness to choose

substance and resulting nuance, and suggests that “differences in nuance among variant phrasings of the same substantive point [can be] so significant as to make one version misleading while another is not.”²⁰⁶ The lawyer herself may have—indeed, probably does have—an opinion about whether one phrasing of a description is more likely to appeal to the jury than another. The critical point, however, is that only the witness, reminded of and constrained by his obligation to tell the truth, can determine whether a particular phraseology is misleading. The lawyer cannot make this decision on behalf of the witness, because the perception was not hers. The witness must decide which of the various verbal formulations accurately reflects his memory of his perception of the historical record. A clear formulation of the applicable ethical standard, therefore, is to say the following: having emphasized the importance of truth-telling to the witness, the lawyer may *suggest* wordings to the witness as options for describing the events, and this may include suggestions about nuance that could potentially tilt the case in favor of the lawyer’s client. Ultimately, however, the lawyer must accept the witness’s formulation and accept that, because it is the witness who is testifying under oath, it is the witness who must be the ultimate judge of which words reflect what he remembers perceiving.²⁰⁷

certain words . . . as long as the ultimate testimony remains truthful”). So far as we have been able to find, no subsequent ethics opinion in the District of Columbia or elsewhere discusses this issue.

206. *Id.* at 139; see also Piorkowski, *supra* note 11, at 402 (noting the same distinction, though his emphasis is whether “the factual meaning of testimony has been altered” by a different choice of words). Although one could define “fact” so as to encompass an entire account of events, the word sometimes has a narrower, more barebones meaning. Mr. Piorkowski’s example is whether a defendant “hit” or “beat” a victim. In a battery case, one could plausibly say that the fact in question is the striking of the plaintiff by the defendant, but the difference in nuance between the words “hit” and “beat,” while factually accurate, may be sufficiently misleading to make a witness uncomfortable with using one word or another at counsel’s suggestion. In that case, the witness’s choice, and the witness’s comfort, must control.

207. Although a lawyer may ethically try to discern *why* the witness is uncomfortable with using a suggested wording, it seems clear that the lawyer may not try to influence the witness to adopt her proposed wording *because* it will strengthen the client’s case. While the lawyer and the witness—who may be the client or a friend of the client—may ethically work to come up with the most persuasive *true* formulation of a description of events that took place, it can never be a good reason for a lawyer to ask her witness to use a formulation which he feels is misleading, and hence untruthful, *because* it will strengthen the case. *Cf.* Salmi, *supra* note 2, at 146 (stating, in the context of discussing the legal effect of answers with a witness, that the lawyer may not provide the witness with a “cash-incentive” to tailor his answers in a particular way). Mr. Altman proposes a three-step process: “First, scrutinize the extent to which the witness’s original characterization is supported by subsidiary evidence; second, propose an alternate characterization of that evidence; and, third, convince the witness that all the evidence supports the alternate characterization better than the original characterization.” Altman, *supra* note 12, at 42. While it would be desirable if the suggested formulation better fits the evidence than the original characterization, we think that the Anti-False Testimony Principle is not compromised if the witness, made aware of his duty to tell the truth, is comfortable that the proposed formulation

C. Ethical Duties of Lawyers in Preparing Witnesses to Testify About Present Understandings

Lawyers notice depositions of opposition witnesses to lock in their accounts of their past perceptions and past mental states. Where witnesses' past actions are at issue, lawyers also want to discover—and lock in—the way those witnesses will explain or justify those actions. Such explanations and justifications, if they are weak and unpersuasive, will strengthen the lawyer's own case. If they are powerful and coherent, they will help the lawyer advise her client about the risks of trial and an appropriate settlement. During the deposition, well-prepared witnesses may use examining counsel's questions to parry the lawyer's questions by justifying what they did and the reasons for their actions, even if the questions did not directly call for such responses. Depositions of third-party witnesses—although less frequent in this respect—can be used for the same purposes. If the case involves transactions in which rights and duties stem from the parties' agreement, examining counsel will attempt to discover and subsequently discredit the witness's interpretations about contractual language or industry practices. If it is a tort case or a case arising from a statute imposing general duties on any member of the public, the examining lawyer will seek to determine how key actors explain, excuse, or justify past actions. Such explanatory testimony falls into the category we call testimony about present understandings.

As demonstrated, such testimony about present understandings differs from testimony about the historical record, which involves the import of information from the external world and past mental states into the record or into the courtroom. From the court's point of view, such testimony constitutes the vehicle to determine—or to get as close as possible to—the verifiable facts.²⁰⁸ To state it another way: there is (or was) something “out there” in the world that witnesses know and remember, and when testifying, they relay their perceptions of what that “something” is. Regarding that information, the lawyer's job is twofold. First, the lawyer must connect and apply the true facts to the law. Second, the lawyer must present the account of that information in such a way that her opponent will realize the strength of her case so that a favorable settlement is possible—or, if agreement cannot be reached, in such a way that will maximize the likelihood of winning at trial. In simple terms, the lawyer must try to show both that her client's version of what happened is more accurate than that of her opponent and that the facts she can prove mesh with each element of the causes of action or defenses needed to prevail. It follows that the duty not to present false testimony is, metaphorically speaking, that the lawyer must not even attempt what ancient alchemists sought to do: to

accurately reports his memory of his perception. The reformulation, in short, does not have to be a “better” account of his perception.

208. See *supra* Part V.

turn base metal into gold. Thus, to summarize, the Anti-False Testimony Principle commands that the accounts in the historical record be accurate—not manufactured to gain litigation advantage.

Testimony about present understandings is not testimony about facts that are “out there” in the world and constituting a part of the historical record. Testimony about present understandings reflects mental states here and now, in the midst of litigation. The Anti-False Testimony Principle is applicable to such testimony as well, but only in the limited sense that when a witness states what his present understanding is, he must not lie. Where present understandings are concerned, there is no external body of historical facts of which an accurate account must be given. To the contrary, present understandings typically form critical parts of current litigation positions. While they can devastate a case if contrary to past events, present understandings do not communicate the perceptions or memories of those events. The difference between these two types of testimony prompts the critical distinction regarding the operation of the Anti-False Testimony Principle: while lawyers cannot help clients change their memories of historical perceptions, lawyers are not falsifying the record when they help their clients formulate their present understandings. Indeed, helping clients to formulate such understandings is an integral part of what litigators are hired to do.

The distinction applies whether the lawyer’s client in litigation is a natural person or an organization (such as a corporation), although the analysis is particularly important in the case of an organization where the entity itself is incapable of having its own present understanding in the way a natural person can. Some individual or group of individuals must formulate what will count as the organization’s explanations, justifications, and excuses, and the obvious persons to perform this task are the lawyers hired by the organization to represent it in the litigation.

To illustrate the application of the principle to present understandings, we begin with the case where the client is an individual, natural person. We then move to the situation where the client is a corporation or other non-natural person. Such cases present an additional wrinkle—that each corporate official may have a different present understanding out of which counsel will be obligated to create the “corporate position” in a piece of litigation.

1. Individual Clients: Preparing the Case and Preparing the Party Witness to Testify

Suppose that a surviving wife sues a cardiac surgeon for medical malpractice that allegedly occurred during an operation in which her husband died. With the support of competent expert testimony, she alleges that during the procedure an unusual problem arose—a problem known as “*P*.” In response to *P*, the surgeon took a series of steps which may be collectively called “*S*.” *S* failed, and the patient died. In preparing to defend the doctor, the lawyer, who

is a specialist in medical malpractice, specifically cardiac problems, examines a number of treatises and articles in the medical literature. Suppose she discovers that while there is some professional authority that recommends *S* when *P* arises during surgery, certain authors say that *S* is inappropriate and that, instead, the operating surgeon ought to take steps “*T*.” Suppose further that, in the minds of these authorities, the choice between *S* and *T* turns on certain ways in which *P* manifests itself during surgery.

In preparing her case, the lawyer knows what happened at the time in question: the doctor took steps *S*. While discussing the matter with the surgeon, she also learns that the doctor has a precise memory of what he thought at the time *P* occurred, including why he chose to do *S*. The historical record is thus clear, and the lawyer has confirmed that her client understands his duty to testify accurately about what he perceived, what he did, and what he thought during surgery. Both the lawyer and her client understand, however, that mounting a plausible defense requires constructing a position defending the doctor’s choice of *S*. If they cannot do so, the chance of succeeding before a jury will be slim, meaning that a settlement figure approaching plaintiff’s full demand must be considered. If, on the other hand, in the defendant-doctor’s deposition and in the reports and depositions of experts, the testimony can persuasively defend the doctor’s choice of *S*, both settlement prospects and the likelihood of a favorable jury verdict improve markedly. Success in the sense of achieving a favorable rather than an unfavorable settlement will critically turn on the defendant-doctor’s direct defense of his choices in the operating theater—for example, whether he is able to convincingly explain that, based on his professional understanding, his choices on the day in question were correct. This defense will constitute his present understanding of why those choices were correct.

The constraints on lawyers who are preparing cases and witnesses who are preparing to testify about the historical record are not present here. The doctor will testify under oath, meaning that he is bound to be truthful and thus cannot say that his present understanding is something other than what it is. To that extent, the Anti-False Testimony Principle applies; however, the truthfulness of the content of that present understanding is not *ethically* constrained by past events or past understanding.²⁰⁹ In developing his present understanding of his choices in the operating room during the surgery in question, the doctor is free to consider any alternative ways of understanding his choices: he is permitted to read and consider the literature on the subject, and he may consult other surgeons. The only constraint upon such reading and consultation is that, if asked in his deposition, the doctor must disclose these additional references.

209. A witness testifying about his present understandings, of course, may be strongly constrained by his past understandings in the sense that an inexplicable change in position could open him up to devastating cross-examination and thus weaken his position. This, however, is a strategic constraint rather than an ethical constraint.

More importantly, the doctor would likely engage in conversations with his lawyer—conversations that would have a strong impact on the doctor’s present understandings. It is a lawyer’s job to prepare her client’s case; it is her job to translate a medical judgment into a legal defense. A lawyer would be permitted to consult with her client on his understanding of the choice between *S* and *T* during the course of the surgery; in fact, it would likely be malpractice for her to fail to do so.

During the lawyer’s preparation of her doctor-witness before his deposition, nothing will be more important than developing a coherent account of his present understanding of what he should have done during the surgery, thereby explaining his actions during the surgery. In working with her client to formulate his testimony about why he chose to take steps *S* rather than *T*, lawyer and client may develop a few options. In an effort to explain away the alleged malpractice, they can take a position that *justifies* the choice of *S* (“*S* was really the better choice because . . .”) or that *explains* the choice of *S* (“*S* seemed to be the right choice because the patient presented *P* in such and such a way.”). In working to formulate their ideal, the doctor and the lawyer are not unconstrained; for example, they are limited by the relevant medical literature and the opinions of the members of the professional specialty. These limits, however, are not *ethical* constraints. To repeat, the only ethical constraint is that the witness cannot offer as his present understanding that which does not actually constitute his present understanding. Adhering to this standard of truthfulness, a lawyer can and should help her client develop the justifications and explanations for his conduct that are necessary to mount a successful defense. It is for this reason that she was hired.

The contrast between testimony of present understandings and testimony about the historical record is thus apparent. With present understandings, there are no facts “out there” in the world to which the testimony must conform. In a case about what happened (or what one’s mental state was) in the past, the lawyer may only work within the confines of what witnesses remember. There may be a number of things that a lawyer would ideally *want* her witness to say, but that simply cannot be said because doing so would be untruthful. Where the witness, like our hypothetical doctor, truthfully testifies as to his present understanding, the question of whether the testimony adheres to the factual record does not arise. From this it follows that the lawyer is not “counsel[ing] or assist[ing] a witness to testify falsely”²¹⁰ when she engages in a dialogue with her client designed to formulate and frame the explanation that the witness will offer. The important point for our purposes, therefore, is as follows: lawyer and client are free to develop whatever present understanding explanation that they want; they are only ethically constrained by the fact that their position must be one that the doctor can truthfully take. Their

210. MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (2009).

formulation of the doctor's litigation position, including what his testimony will be, is not limited by the numerous constraints imposed on testimony about the historical record by the Anti-False Testimony principle.

2. *Corporate: Preparing the Case and Preparing Witnesses to Testify*

Representation of a corporation or other entity²¹¹ adds another ingredient to the mix because Model Rule 1.13(a) provides that “[a] lawyer employed or retained by an organization *represents the organization* acting through its duly authorized constituents.”²¹² A consequence of this requirement is the apparent anomaly that when a lawyer speaks to persons who choose to retain her, direct her work, pay her bills, and to whom she is responsible for the satisfactory handling of the matter, she is not speaking to her clients; rather, she is speaking to agents of her organizational client. In this situation, the attorney-client privilege is applicable to such conversations between lawyer and agents of her client,²¹³ but in the event of a conflict of interest arising between the organization and the individual, the lawyer owes her duty to the organization itself.²¹⁴ Only these agents can testify about “the corporate position” with respect to its present understandings or the historical record. Although our concern in this section is testimony about present understandings, conflict of interest problems can arise when lawyers are preparing their corporate witnesses. Such problems often arise with regard to anticipated testimony about events in the historical record and about present understandings when witnesses testifying on behalf of the organizational client disagree.²¹⁵ Although it requires a brief return to testimony about the historical record, we first consider conflicts arising from inconsistent testimony about the historical record before returning to preparation of testimony about present understandings.

211. For the sake of convenience, we use the term “corporation” in this discussion to encompass not only corporations properly so called but also other organizations. We do this because corporations are the most commonly represented and the first named of various organizations in Rule 30(b)(6) of the Federal Rules of Civil Procedure—the rule governing the depositions of such organizations. *See* FED. R. CIV. P. 30(b)(6).

212. MODEL RULES OF PROF'L CONDUCT R. 1.13(a) (emphasis added).

213. *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 397 (1981) (ruling that the attorney-client privilege extends to communications between the lawyer and certain employees of the client corporation beyond the corporation's “control group”).

214. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13; *see also In re* Conduct of Campbell, 202 P.3d 871, 878 (Or. 2009) (“When a lawyer represents a corporation, the lawyer represents, for the purpose of conflict of interest analysis, the entity, not the person who manages the entity.”).

215. By “corporate witnesses,” we mean officers and employees whose testimony will be sought in cases in which their corporate employer is a party. This term is not confined to witnesses designated to testify on behalf of the corporation under Rule 30(b)(6) of the Federal Rules of Civil Procedure. FED. R. CIV. P. 30(b)(6).

a. Reconciling Testimony of Corporate Witnesses Concerning the Historical Record

In representing her corporate client in litigation, the last thing an attorney will want to learn is that two corporate employees each have different and inconsistent memories of the historical record. This problem can arise where the issue concerns perceptions of events. Suppose that a company let time slip away in pursuing a cause of action against a general contractor for defective workmanship on its building. Under applicable law, the question of whether the statute of limitations has run depends on the time that the cause of action accrued, which, in turn, depends on when company officials discovered cracks in the cement floor.

Two company employees—“Arnold” and “Blake”—agree that they first saw the cracks together during a routine inspection of the physical plant. There is no evidence that anyone saw the cracks before they did. Arnold says: “I know that the inspection occurred on June 14, because that’s my daughter’s birthday, and I remember that I had to get home for her party.” Blake, just as confidently says: “The inspection took place on June 21. It couldn’t have been June 14 because I left early that day to head to a meeting in Chicago, and I know I did not leave my office before I went to the airport.” Suppose the statute of limitations ran on June 17, two years later. If Arnold’s account is correct, the statute has run and the cause of action is barred; if Blake’s account is accurate, the case is timely. In preparing for the hearing on defendant’s motion to dismiss on the ground that the statute of limitations had run, corporate-plaintiff’s counsel is strongly constrained by the Anti-False Testimony Principle, because the issue involves the historical record.

While the lawyer may certainly probe Arnold’s testimony to ensure that his memory is accurate,²¹⁶ she cannot ask him to testify falsely or intimate that it would be in the company’s best interest for him to say that he was not sure whether he saw the cracks during an inspection on June 14.²¹⁷ Because the company’s lawyer must assume that the defendant will depose Arnold, or, if no discovery is allowed on the motion, call him to testify if she fails to examine Arnold, she will be forced to construct her case by arguing why Blake’s account is more reliable. The company has hired the lawyer to construct and advance its litigation position, but if Arnold honestly believes that he is correct about the date on which he saw the crack, counsel must construct the company’s position around Arnold’s damaging contradictory testimony. The Anti-False Testimony Principle permits no other course.

216. See Salmi, *supra* note 2, at 140 (“It is appropriate to prepare a witness because usually several years have passed since the events in question. The attorney therefore should refresh the witness’s recollection of the facts and familiarize the witness with relevant documents.”).

217. *Id.* at 153–54.

A similar problem arises where a case presents an issue turning on the historical question of “a company’s understanding” of a term in the contract at the time the contract was signed. A non-natural person like a corporation cannot, in a literal sense, have an understanding. Only its agents can have present understandings, but in certain circumstances, such understandings can be attributed to the corporation.²¹⁸ For example, at the time a company entered into a contract, if all of its agents understood that a particular contract provision had the same meaning, then that part of the historical record is fixed, and the lawyer is constrained by it. Suppose, however, that the corporate officials had different understandings at the time of contract formation. Suppose that completion of a construction project is delayed because of a strike among employees of a supplier of key raw materials. Now, during litigation, one or more corporate officials remembers thinking at the time the agreement was made that a strike in a supplier’s factory would excuse late performance, and another remembers thinking that it did not. Here, the situation is identical to the situation in which different corporate witnesses have irreconcilable memories about the occurrence of an event in the physical world, such as the discovery of a crack in a building that caused a claim for defective workmanship to begin to accrue. This is so because in both scenarios, counsel will have to select the account that is more favorable and that she thinks she can better defend in order to develop a strategy that explains away or minimizes the significance of the damaging account, assuming that opposing counsel elicits the contradictory testimony. To the extent that she cannot reconcile such accounts, her case will be weaker, thus diminishing the settlement value of her case.

b. Lawyer Involvement in the Creation of Corporate Understandings

A lawyer developing a litigation strategy for a corporate or other organizational client does so in the same way as when the client is an individual. Where a part of the case is the client’s current understanding of a legal provision, the safety of action that was taken, an explanation of past conduct, or something else, lawyer and client work together to create a position that works for the litigation as a whole. This strategy, however, is contingent on the standard that when testifying in deposition(s) or at trial, the client or, in the corporate case, client representatives, honestly believe(s) that the testimony is true.

218. This is the essence of the “corporate deposition” contemplated by Rule 30(b)(6) of the Federal Rules of Civil Procedure, wherein the corporation must name “one or more officers, directors, or managing agents” to testify as the voice of the corporate entity, with the corporation bound by that designated persons’ testimony. *See* FED. R. CIV. P. 30(b)(6); *see also* *State Farm Mut. Auto. Ins. Co. v. New Horizon, Inc.*, 250 F.R.D. 203, 212 (E.D. Pa. 2008) (holding that “the testimony of the Rule 30(b)(6) designee is deemed to be the testimony of the corporation itself” and that such testimony is binding, although not in the sense of a judicial admission).

The difference between the corporate case and the individual client case is the possibility that when an organization is the client, differing views from the organization's agents must be reconciled to create a coherent litigation position. In the individual medical malpractice case, the physician-witness can testify to any present understanding that he has, regardless of how he arrived at it. He may well have an understanding—in the sense of an explanation or a justification—soon after the event and before litigation against him has commenced. Or he may develop it in thinking through, with counsel, how to defend the medical malpractice case. In a case on behalf of a company, on the other hand, it is the task of the lawyer to formulate the company's position based on what happened or what the contract says (if there is one), as well as on what corporate officials think about the situation. A corporation frequently will not articulate the position it will take in litigation—whether it is the claimant or the defendant—*until* the lawyer it has hired has commenced working on the case. Indeed, one of the reasons that counsel is hired is to take the lead in formulating the corporation's position.

When representing a corporate client, however, a lawyer can only create a coherent litigation position to the extent that the accounts of various corporate officials whose opinions matter can be rendered in a coherent and consistent form.²¹⁹ However—and this is the crucial difference between the historical record and present understandings—the lawyer preparing the part of the case that concerns explanations or justifications need not *begin* with what her clients tell her, as she must do when the historical record is concerned. An experienced medical malpractice defense lawyer may have a good idea about what a surgeon should have done in the operating theater, but she is still, medically speaking, a layperson. This is not so in many complex commercial cases. Corporations hire lawyers to *create* a legally sound and factually plausible case. This fact is particularly true in contract litigation, especially complex commercial contract litigation. Where contract terms or post-hoc understandings of past actions are at issue, the lawyer representing a corporation or other organization has (or may have) a problem in addition to the problems faced by the medical malpractice lawyer and her doctor-client while explaining earlier actions in light of the doctor's present understanding. The problem is that more than one voice can speak for the corporation. In an effort to create an inconsistency in the organization's position, opposing counsel will use depositions to attempt to induce some company employees to

219. *Which* corporate officials' understandings matter turns upon what is at issue in the case. While the understandings of senior executives are likely to be highly influential, such executives are frequently not the persons whose understandings actually matter. Senior executives, while "in charge," might have had little or nothing to do with the negotiation of the contract whose terms are now at issue, or making the safety decision upon which the company's liability turns.

express their individual understandings and explanations differently from the way in which other employees have.²²⁰

While preparing their corporate witnesses to testify—whether the witnesses will testify as fact witnesses in their individual capacity or as corporate designees under Rule 30(b)(6) of the Federal Rules of Civil Procedure or under similar state procedural provisions—lawyers may work with their clients to formulate the position the corporation will take in litigation. For example, lawyers and clients will develop present understandings of the dispute: in this contract dispute, *this* is our understanding of why we are entitled to damages when a construction project was delayed by a strike, or in this products liability litigation, *this* is why we believe we are correct to have made the safety choices we made regarding a product whose defects are at issue. By attending to the distinction between testimony about the historical record and testimony about a witness’s present post-hoc understandings, however, it is easy to see that in preparing to respond to this anticipated tactic, company lawyers do not face the same *ethical* challenges that they face when confronted with conflicting accounts of the historical record. Lawyers do not violate the Anti-False Testimony Principle when they work with the employees of organizational clients to construct those portions of their clients’ litigation positions that depend on present understandings.

VI. CONCLUSION

Two ideas inform the central thesis of this Article. The first is that the different rules governing a lawyer’s ethical duties when preparing a witness combine to reflect a single, underlying moral premise. That premise, which we call the Anti-False Testimony Principle, prompts the lawyer to distinguish sharply between testimony that is inaccurate because of human error and testimony that is inaccurate as a result of a lawyer’s deception. Although the application of the Principle can create thorny problems in certain fact situations, as we explored in Part V, the Principle’s basic thrust is simple: a lawyer may not deceptively offer or permit a witness to offer inaccurate testimony to improve the record to benefit her client.²²¹ We have focused our

220. There is a further limitation on the application of the Anti-False Testimony Principle where organizational clients are concerned. A corporate designee witness pursuant to a rule such as Rule 30(b)(6) of the Federal Rules of Civil Procedure, at least in theory, can testify to an understanding that is not *his* understanding. See FED. R. CIV. P. 30(b)(6). That is because he speaks as the organization and when questioned about “what is your understanding of” a particular term in the contract, or about “your understanding of certain safety trials,” the word “your” refers to the organization—not the individual witness. See *id.* Because a Rule 30(b)(6) witness can be asked questions about his personal knowledge or understandings (for example) and his lawyer cannot instruct him not to answer the question on that ground, a lawyer takes a severe tactical risk when she asks a corporate designee to testify to “corporate understandings” with which the witness personally does not agree.

221. See MODEL RULES OF PROF’L CONDUCT R. 3.4(b) (2009).

attention on deposition practice because testimony about the historical record is typically given in the first instance, and hence locked in, during depositions. This focus, however, does not imply that the Anti-False Testimony principle does not apply in civil trials or criminal proceedings—it most certainly does.

The second central idea of this Article is the distinction between testimony about the historical record and testimony about present understandings. This distinction is particularly important in deposition practice because deposition examination is not limited by the rules that determine admissibility at trial.²²² Although present understandings can sometimes be admissible at trial—for example, when a doctor defends a malpractice claim by explaining why he made a particular choice during surgery²²³—present understandings are common fodder in depositions, regardless of admissibility at trial. Planning to weigh the strength of their case with an eye toward either settlement or the possibility of prevailing on summary judgment, lawyers want to know how the opposing party (or key witness testifying on behalf of the opposing party) understands the major issues in the case. While witnesses testifying about present understandings are constrained by the Anti-False Testimony Principle to the extent that they cannot lie about what they offer as their understanding, witnesses testifying about present understandings are not burdened by the prohibition on falsifying accounts of verifiable facts that are, in principle, “out there,” namely the description of what they remember perceiving or thinking at some point in historical time.

When preparing a witness for deposition about the historical record, that record—through the Anti-False Testimony Principle—constrains the lawyer. Helping a witness think about the facts, consider word choice, and evaluate alternatives does not violate the ethical rules, provided that the lawyer keeps this Principle and its underlying moral premise in mind. If the lawyer does this, she will not cross the line into unacceptable manipulation of witness testimony. The lawyer has wide latitude within the Anti-False Testimony Principle in working with witnesses to formulate their present understandings. Such understandings are a critical part of the lawyer’s performance of the task for which she was retained: to develop the client’s case ethically in a manner that will maximize the client’s chance to achieve the best outcome, given the constraints of verifiable facts in the historical record.

222. See FED. R. CIV. P. 26(b)(1) (dictating that discovery sought in a deposition need not be admissible at trial, but rather, it need only be “reasonably calculated to lead to the discovery of admissible evidence”).

223. See *supra* Part V.C.1.