On Reconsideration

THE RELATIVITY OF LEGAL ETHICS

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In *To Kill a Mockingbird*, Tom Robinson, a Black man in 1930s Alabama, is on trial, falsely accused of raping a young White woman. His lawyer, Atticus Finch, concludes that the only path to an acquittal is to put Robinson on the stand. It's risky because whenever a criminal defendant takes the stand, cross-examination can be a minefield. Despite the defendant's innocence, a single bad answer can convict.

Tom testifies that the woman, Mayella Ewell, spotted him walking by her house. As she had done on other occasions, she asked him to help her fix something. Tom had always obliged. This time, when he came into the house, Mayella tried to kiss him. Tom rejected her advances and left.

On cross-examination, the prosecutor asks Tom why he stopped at Mayella's house. Tom struggles to answer. Finally, he says that he felt sorry for Mayella. Fatal answer. Social rules were well established. Tom's answer inverts the social order. Someone in a superior position on the dominance hierarchy could pity someone in a lower position, but not the other way around. In the minds of the all-White jury in 1930s Alabama, Tom's answer was the same as saying he was better than Mayella. In the jurors' minds, that wasn't just an offense against Mayella; it was an offense against the whole community, against the jury itself.

In Aaron Sorkin's brilliant stage adaptation, Atticus anticipated that question. He knew that if Tom said he felt sorry for Mayella, the jury would convict. So, in preparing Tom to testify, Atticus cautioned him not to say that, but rather to answer, "It looked like she needed some help." They practiced it. They rehearsed it. Multiple times.

But the preparation failed. At the key moment, Tom gave the wrong answer.

Was Atticus's effort to get Tom to give the preferred answer an ethics violation? When preparing a client to testify, if the lawyer hears the client spontaneously give an answer that the lawyer thinks will hurt the case, is it ethical for the lawyer to craft a better, less risky answer, verify its truth with the client, and then advise the client to use that answer instead?

If yes, then do the ethics rules allow the lawyer to drill it into the client—what some call woodshedding—rehearsing it, even excessively, to ensure that the client will give the better answer, the one that improves the chances of winning?

And if yes, if the lawyer *may* develop the client's testimony that way, do the ethics rules stop there? Or given the duty to provide competent or zealous representation, do our ethics rules *require* the lawyer to do those things?

What Makes Something Unethical?

The answers to these questions, though interesting, are not as interesting as how lawyers instinctively view their ethical dos and don'ts. In a recent survey of dozens of experienced litigators nationwide, a minority of respondents believed it *unethical* to suggest any answer to the client. But most thought that the lawyer was ethically *permitted* to craft a truthful answer for the client and to counsel the client to give it. And about as many saw nothing wrong with woodshedding. They approved of aggressive rehearsing to ensure that the better answer would come out.

That said, most thought that the lawyer had no ethical *duty* to recommend the better answer or to woodshed the client, even though the better truthful answer could save the client. Only a small portion of those who approved of advising the client to use the lawyer-crafted answer thought the ethics rules *required* the lawyer to give that advice, while some, though fewer, even thought that woodshedding was also ethically required.

Many respondents, perhaps uncertain or uncomfortable about taking a position, recommended tactical workarounds that would lead the client to believe that the client alone discovered the better answer, without the lawyer suggesting it directly. If those tactical maneuvers were the respondent's way of getting to the same end point while keeping the lawyer's ethical conscience clear, this might be a good example of an

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everyday interaction between lawyers and clients with ample ethical ambiguity to make it worth asking this:

What makes something unethical and why is it sometimes so complicated to figure it out?

Let's first focus on the large numbers who thought that the lawyer is ethically permitted, but not required, to recommend that the client give the lawyer-crafted truthful answer and to rehearse the answer aggressively with the client. That was the clear majority view. But what does that say about ethical consistency? By what logic is it ethically permissible to suggest the better truthful answer and drill that into the client, but not an ethical requirement?

What kind of an ethics system *permits* lawyers to recommend that the client follow a strategy that the lawyer firmly believes is in the client's best interest, but does not *require* that the lawyer make that recommendation?

Let's pause to compare the medical profession. If a patient wants a specific procedure and the doctor knows that another procedure has a much higher success rate with much lower risks of death or complications, the doctor would not only be ethically *permitted* to advise the patient to choose that preferable procedure but no doubt ethically *required* to do so. This seems to be where the American Medical Association's Code of Medical Ethics Opinion 1.1.1 leads:

> The practice of medicine, and its embodiment in the clinical encounter between a patient and a physician, is fundamentally a moral activity that arises from the imperative to care for patients and to alleviate suffering. The relationship between a patient and a physician is based on trust, which gives rise to physicians' ethical responsibility to place patients' welfare above the physician's own self-interest or obligations to others, to use sound medical judgment

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on patients' behalf, and to advocate for their patients' welfare.

The late Dr. Franz Ingelfinger, when he was editor of the New England Journal of Medicine in the 1970s, taught that

> [a] physician who merely spreads an array of vendibles in front of the patient and then says, "Go ahead and choose, it's your life," is guilty of shirking his duty, if not of malpractice. The physician, to be sure, should list the alternatives and describe their pros and cons but then, instead of asking the patient to make the choice, the physician should recommend a specific course of action. He must take the responsibility, not shift it onto the shoulders of the patient. The patient may then refuse the recommendation, which is perfectly acceptable, but the physician who would not use his training and experience to recommend the specific action to a patient—or in some cases frankly admit "I don't know"—does not warrant the somewhat tarnished but still distinguished title of doctor.

Isn't the relationship between a lawyer and client similarly based on trust? When it comes to actions that have legal consequences, isn't the lawyer supposed to know better than the client? Doesn't that create an ethical responsibility for the lawyer to use sound legal judgment on the client's behalf and to advocate for the client's welfare? And doesn't that translate to an ethical *duty* to advise the client against giving a fatal truthful answer when a nonfatal and equally truthful answer is readily available?

Why would lawyers who believe that they can ethically recommend the better answer and even woodshed the client to give it also believe that they have no ethical *duty* to recommend that better answer?

Reasons Against Ethical Duty

Three possible explanations surface—one cynical, one pragmatic, one principled.

The cynical explanation is that a lawyer's mind favors interpreting ethical freedoms broadly and ethical duties narrowly. That approach benefits the lawyer because it gives the lawyer wide latitude while excusing lawyers who fail or choose not to advise the client about the available case-saving answer. This cynical explanation is rooted in minimizing ethical risk for the lawyer, not intentionally but perhaps instinctively, the same way that humans generally protect themselves first and others second.

> What ethical logic permits lawyers to suggest the better truthful answer and drill that into the client, but does not require it?

The pragmatic explanation is that requiring lawyers to recommend the better answer could make the lawyer's job impossible. The lawyer would be ethically required, during preparation, to evaluate every answer, to consider whether better, similarly truthful, answers could be given, and then to advise the client accordingly. That burden, the thinking goes, would drive a stake in the heart of witness preparation. Preparation would become way too cumbersome. Who could fulfill that duty?

The principled explanation is more client-focused. Some survey respondents explained that, if a lawyer were duty-bound to suggest a better truthful answer, the lawyer might confuse the client into giving the right answer at the wrong time or into delivering the answer in the wrong way. Or the lawyer might be mistaken about the effect of the two potential answers. If the lawyer had such an ethical mandate, this thinking goes, it could accidentally harm the client. The decision whether to give the advice or hold it back should thus be in the lawyer's discretion.

But all three explanations share a defect. They fail to honor what the client needs most from the lawyer—the lawyer's help. The only two legitimate-sounding explanations—the pragmatic one and the ostensibly principled one—are easily answered. In witness preparation, lawyers are constantly evaluating each practice answer, assessing how it will help or hurt the case, and often thinking of better answers whose truth the client can easily verify. The issue is not whether a lawyer has a duty to *come up with* a better truthful answer but whether the lawyer has a duty to share it with the client and recommend that the client use it *if* the lawyer has one and genuinely believes the client would be better served by it.

The comments to ABA Model Rule 3.4 say that fairness in the adversary system is secured by prohibitions against improperly influencing witnesses. But comments to ABA Model Rule 1.3 say that a lawyer should "take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor" and act "with zeal in advocacy upon the client's behalf." Notice the tension. The comments to these two rules seem to pull in opposite directions, further confusing the boundary between what's permissible and impermissible, what's mandatory and what's optional.

If lawyers cannot always agree on what the *law* permits or requires, then how can we expect agreement on what the *ethics rules* permit or require?

According to the informal survey, while most litigators believe that ethics rules let lawyers suggest a better truthful answer and woodshed that answer into the client, a noticeable minority think that both the suggested answer and the woodshedding are ethically wrong. To them, any lawyer

involvement in developing a client's answer seems improper.

The View from Other Common-Law Countries

While that latter view appears to be the minority view in the United States, it is the categorical view on the other side of the Atlantic. While *failure* to prepare a witness would be rare in the U.S., not so in England, Wales, Ireland, and many other common-law countries. There, the rules *prohibit* preparing a witness, at least as done in the U.S.

In an age of enlightenment, how could different common-law systems that hold themselves out as models of due process and impartial fact-finding have such opposing ethical views of something that each system considers essential to the integrity of its truth-finding mechanism? The answer lies in different perspectives and assumptions, highlighting what might be an uncomfortable truth: The perceived fairness of an outcome turns on the culture that produces it. To understand why, first consider the similarities among common-law justice systems.

In common-law countries, justice is supposed to be the product of an adversarial process designed to discover which of two differing accounts is true. The system provides tools to do this, including allowing each side to offer evidence through witnesses and documents, to have a trained advocate present that side's case, to have that advocate test the other side's evidence through cross-examination, to have the advocate offer developed argument on why that advocate's evidence should be believed and why the other side's evidence should be disbelieved, and to have the controversy decided by an impartial adjudicator.

But when we drill down into two of those commonalities—offering evidence through witnesses and subjecting the other side's witnesses to cross-examination—we find that the cultural pillars on which they rest in other countries differ from those in the U.S. Not just differ; they're polar opposites.

In most common-law countries, witnesses are assumed to be their most truthful if their testimony is unaffected by their lawyer's influence. Preparing a witness to testify is seen as raising a grave risk that the witness's words will be filtered, altered, or modified by the lawyer so that what the witness says will fall short of the truth. And what the adjudicator hears will be the lawyer's words as spoken by the witness, rather than the witness's words.

In those countries, American-style witness preparation is seen as akin to witness tampering. A witness who has been "prepared" is seen as untrustworthy because the testimony has been artificially enhanced by the lawyer's handicraft. It would be the testimonial equivalent of an athlete on steroids.

A "prepared" witness, the thinking goes, could be more likely to feed the cross-examiner misleading information or rehearsed answers that present the witness's story in an undeservedly favorable way or in ways that bury or obscure the truth. Preparation also risks helping the witness conform the testimony to what other witnesses might say or to what aligns with key documents, instead of what the witness independently recalls. The fact finder's job is then thought to be harder. And the harder it is for the fact finder to hear the witness's most candid and unrehearsed answers, the harder it will be for the truth to emerge.

In this model, a witness's unvarnished answers, untainted by a lawyer's counseling, are crucial to the integrity of the truth-finding process. Simply put, there can be no confidence in the outcome if the adjudicator is basing a decision on testimony shaped by the witness's lawyer. According to Her Majesty's Court of Appeal in England, the only permissible witness preparation is what's called "witness familiarisation," which entails "familiarising the witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants," but it does not encompass "discussions about proposed or intended evidence" or "rehears[ing], practic[ing] or coach[ing] a witness in relation to his evidence."

The American System

Most American lawyers see it differently. The American system recognizes that witnesses have different communication skills, but that doesn't mean that the better communicators own the truth, despite how much more believable they may sound. Some witnesses also have weaker memories than others, but that doesn't mean that one who speaks with hesitation is mistakenly remembering the events, even though such seeming uncertainty could cause others to draw that conclusion. And an experienced cross-examiner has rhetorical advantages that can run circles around inexperienced witnesses, inducing them to say things out of context that leave an impression very different from the truth.

The American system seeks to compensate for these structural inequalities and for the tactical advantages that professional interrogators hold over witnesses whose day jobs don't include testifying. Because the outcomes of legal disputes can be severe, the American system recognizes that parties and witnesses need lawyers to help them prepare for the testimonial experience. It would be unheard of for lawyers, during the preparation, to avoid discussing the witness's expected testimony or to sidestep a review of the case facts and the expected testimony of others. Contrary to ethics rules in other countries, our *Restatement (Third) of the Law Governing Lawyers* states that permissible witness preparation may include

> discussing the witness's recollection and probable testimony; revealing to the witness other testimony or

> evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross examination that the witness should be prepared to meet.

But the *Restatement* doesn't stop there. It also says that "witness preparation may include rehearsal of testimony" and that a "lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact."

The thinking is that witness preparation in this sense helps truth-finding. When a witness has a fuzzy memory of the key events but could refresh that memory by preparing with the lawyer, most American lawyers would agree that the truth-finding function would be better served if the witness testified with a refreshed memory instead of a deficient one. When a witness has trouble explaining why he chose A over B but would be aided in explaining by preparing with the lawyer, most American lawyers would agree that the truth-finding function would be better served if the witness were clear about the reasons.

Still, the *Restatement* does not directly answer whether a lawyer can suggest that a client give a different truthful answer from the one the witness originally provided during preparation. While suggesting word choices is permissible to make the witness's meaning clear, and while suggesting false answers is prohibited, suggesting a different truthful answer simply because it strengthens the claim or defense seems to fall into neither bucket.

Unfortunately, case law and ethics opinions provide only limited guidance. In 1976, the Supreme Court in *United States v. Geders* did not bar a lawyer from consulting with the client about the testimony during an overnight break, but the Court cautioned that this would create a danger of "improper coaching," which a prosecutor might be free to explore on cross-examination. While the Court acknowledged an "important ethical distinction between discussing testimony and seeking improperly to influence it," it gave only one example of what would constitute the latter: knowingly participating in introducing fraudulent, false, or perjured testimony.

In 1990, the Maryland Court of Appeals, in *State v. Earp*, described what it considered a different example of improper influence: "the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be." But Ethics Opinion 79 from the District of Columbia Bar seems to go the other way: the lawyer may suggest that a witness use particular words or phrases as long as the substance of the testimony is something the witness can truthfully and properly testify to and is not, as far as the lawyer knows or ought to know, false or misleading.

While that might be comforting for lawyers who practice in Washington, D.C., the ABA has yet to go so far. In its 1975 Ethical Consideration 7-26, the ABA said that a lawyer should present "any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured."

But what about suggesting a different truthful answer from the one the client originally provides during preparation? Would that be evidence that "the *client* desires to have presented" or just evidence that, in the client's best interest, the *lawyer* desires to present? For this purpose, is the lawyer's desire synonymous with the client's desire?

With ethical questions, clear answers give us great comfort. Even when we don't know the answer, we prefer knowing that there's an ethical truth that we can discover through research or by consulting someone with superior ethical knowledge. Ethics, after all, is as basic as right and wrong. Surely, there must be a right answer.

But what are we to do when an answer that *could be* either yes or no, and in fact *should be* either yes or no, differs among people of high integrity? How do we reconcile a conviction, strongly held by some, that a particular practice is ethically permitted or mandated with a conviction, strongly held by others, that the very same practice is neither ethically permitted nor mandated?

It's tempting to think that ethics rules descend from a mystical council of sage legal philosophers whose pronouncements should be treated as gospel. But it doesn't work that way. Nor is there a hierarchy of principles that we can consult to resolve conflicting opinions. Sometimes the rules hold the client's interest to be sacrosanct, such as rules requiring lawyers to preserve client confidences. Sometimes the rules hold the interests of others to be sacrosanct, such as rules permitting lawyers to disclose client confidences when the lawyer believes it to be necessary to prevent reasonably certain death or substantial bodily harm. But even that rule raises the question of why the lawyer may make the disclosure but is not required to do so. Is the permissive, but not mandatory, nature of the rule just an example of professional protectionism?

We assume that, on balance, our ethical rules get it right most of the time in most of the circumstances that we most often encounter. But is that enough? How comfortable should we be when the answer to "Did Atticus Finch commit an ethics violation?" is "It depends on whom you ask"? ■