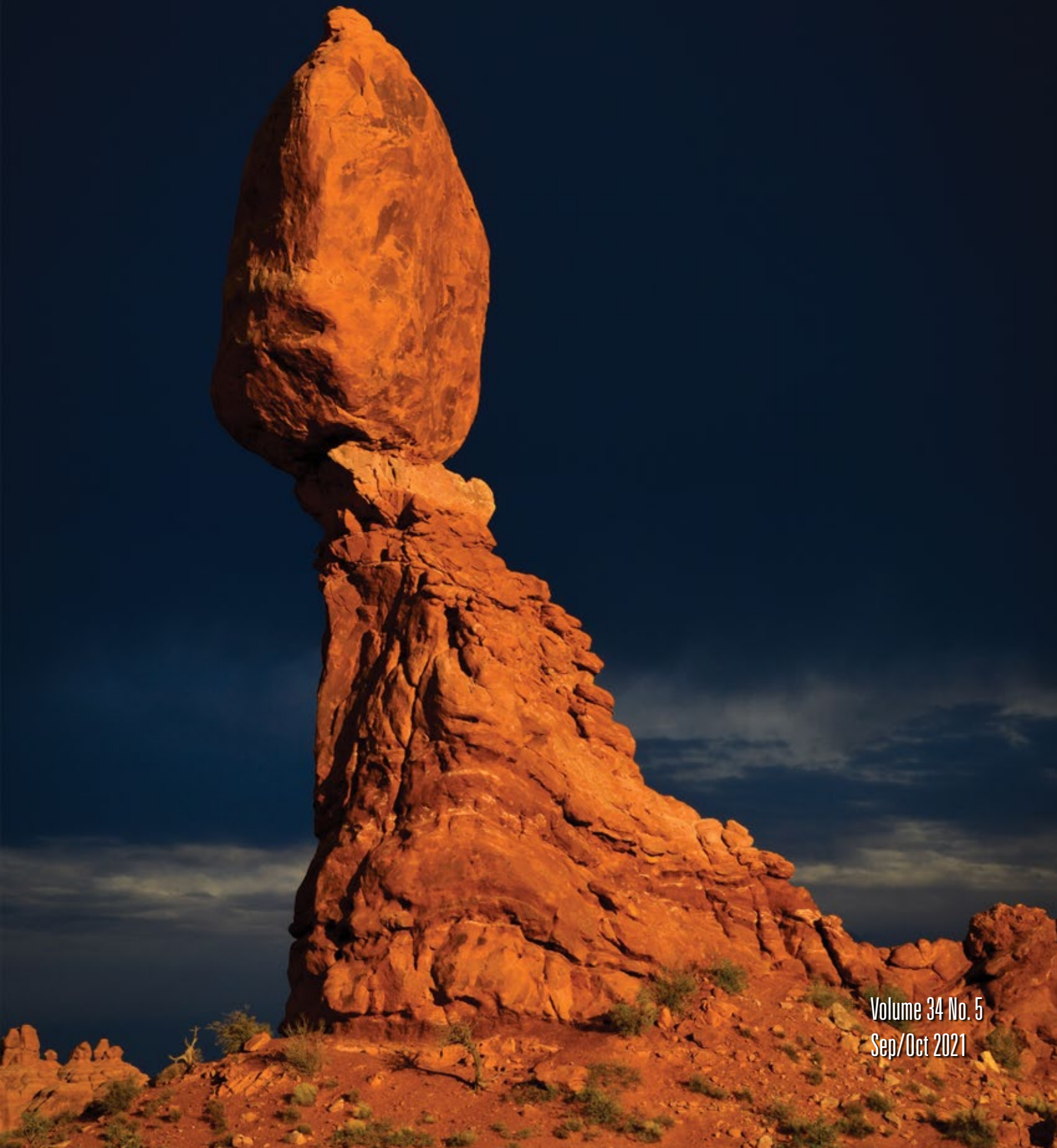
Utah Bar® JOURNAL



Volume 34 No. 5
Sep/Oct 2021

Horse-Shedding Witnesses

by Benjamin Cilwick and Keith A. Call

> *"[The lawyer's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."*
>
> – *In re Eldridge*, 82 N.Y. 161, 171 (1880).

In his 1850 novel, *The Ways of the Hour*, James Fenimore Cooper wrote one of the first mystery novels that revolved almost entirely around a courtroom murder trial. Cooper used the novel to, among other things, express his discontent with corruption among New York's courts and juries. He is believed to be the originator of the phrase "horse-shedding," a reference to the practice of attorneys who lingered in carriage sheds near the courthouse in White Plains, New York, to rehearse their witnesses. *See* James W. McElhaney, MCELHANEY'S TRIAL NOTEBOOK, 100 (4th ed. 2005). Today, of course, the term "horse-shedding" can still carry negative connotations, suggesting that the lawyer is trying to manipulate a witness's testimony before the witness actually testifies.

Conscientious lawyers aim to advocate zealously for their client within the bounds of ethical and professional duties. But vigorous representation can tempt the unscrupulous to betray those duties. Witness preparation in particular harbors a tension between duties to the client and duties not to advocate falsehoods or to mislead the tribunal. The over-zealous might seek to improperly influence testimony through coaching. Yet legitimate witness preparation is indispensable for effective advocacy. It would be foolish, and likely a dereliction of duties to the client, if a lawyer failed to prepare witnesses in some fashion. The "failure to prepare witnesses for depositions is a genuine professional disservice." *Id*. So, it is important to distinguish permissible preparation from improper coaching. That is no small task.

The Good and the Bad

Lawyers' obligations to be truthful and honest extend beyond their own statements and omissions. In the context of witness preparation, lawyers must not attempt to lie or dishonestly advocate via witnesses. Lawyers are barred from "counsel[ing] or assist[ing] a witness to testify falsely." Utah R. Pro. Conduct 3.4(b). Likewise, "[t]he lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." Utah R. Pro. Conduct 3.3, cmt. [2]. So, lawyers must seek to ensure that witnesses provide honest, independent testimony. Respecting prohibitions against improperly influencing testimony helps to ensure "[f]air competition in the adversary system." Utah R. Pro. Conduct 3.4, cmt. [1].

Fair competition, though, does not always excite those bent on winning at all costs. On the far end of the spectrum, such acts as requesting, convincing, encouraging, or enabling a witness to lie are improper coaching. To note an egregious example, the Eighth Circuit Court of Appeals once affirmed a district court's disbarment order against an attorney who advised a client to lie about the details and extent of an extramarital affair. *In re Attorney Discipline Matter*, 98 F.3d 1082, 1088 (8th Cir. 1996).

Yet even when lawyers do not counsel dishonesty, if a witness gives testimony a lawyer knows to be false, the lawyer must "take reasonable remedial measures, including, if necessary, disclosure to the tribunal." Utah R. Pro. Conduct 3.3(b). If the

BENJAMIN CILWICK is a second year law student at the University of Utah S.J. Quinney College of Law. He spent the summer clerking at Snow, Christensen & Martineau.

KEITH A. CALL is a shareholder at Snow, Christensen & Martineau. His practice includes professional liability defense, IP and technology litigation, and general commercial litigation.

lawyer only reasonably believes, but does not know, the testimony to be false, the lawyer may permit or refuse its presentation. Utah R. Pro. Conduct 3.3 cmt. [8].

One guiding mantra derives from the epigraph with which we began: "*The lawyer must not try to pour favorable testimony into the witness, but instead must extract from the witness honest testimony favorable to the client and must prepare the witnesses to present that testimony compellingly.*"

In re Eldridge, 82 N.Y. 161, 171 (1880).

This standard can help to ensure that witness preparation – a "uniformly followed" practice in the United States – proceeds within the bounds of ethical and professional rules. Restatement (Third) of the Law Governing Lawyers § 116, cmt. b. Prudent lawyers will further hone their tactics and develop additional guiding rules. The Restatement (Third) of the Law Governing Lawyers provides a non-exclusive list of legitimate tactics:

- Discussing the role of the witness and effective courtroom demeanor;
- 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;
- Discussing probable lines of hostile cross-examination that the witness should be prepared to meet; and
- Rehearsing testimony and making suggestions to make the witness's meaning clear.

Id.

These tactics prepare the witness with respect to the form, veracity, value, import, effectiveness, scope, and manner of presentation of their testimony. The lawyer may even offer advice concerning the *content* of their testimony (e.g., by discussing the witness's recollection and probable testimony), just so long as the lawyer's advice does not undermine the witness's honesty or the testimony's veracity.

Strategies for Tricky Cases

What constitutes "improperly influencing witnesses" can be murky. To clarify the boundary between prudent prepping and bad coaching, a lawyer might ask themselves several questions as they prepare a witness:

1. Have I unambiguously expressed to the witness the importance of honest and truthful testimony?

Stress to the witness at the beginning, middle, and end of the session that they are to provide only honest testimony. Simple reminders may help: "Only honest testimony helps our case," or "Don't embellish or stretch the truth because you think it will help my client."

2. What strategies have I offered the witness to testify compellingly, but honestly?

Counsel only strategies (i.e., word choice, demeanor, scope of testimony, and so on) that do not invite the witness to play fast and loose with the truth. Doing so reinforces to the witness that misleading or dishonest testimony is not permitted.

3. What is the witness likely to take away from my preparation session?

Avoid conduct that might indicate you condone, expect, hope, or otherwise want the witness to falsify testimony. While you may not intend or wish the witness to be dishonest, they may do so of their own initiative. You cannot always control that. However, once you know false evidence has been presented, remedial measures are required. Prevent such circumstances by not giving the witness reason to think that you want or approve of dishonesty.

Conclusion

Lawyers' ethical and professional duties constrain the scope of permitted witness preparation tactics. Yet the effective advocate must prepare witnesses as they build the client's case. To avoid unethical and unfair conduct, it is important to consider strategies that ensure witness truthfulness. The duty of zealous advocacy, while perhaps foremost in many lawyers' minds, must not eclipse the lawyer's professional and ethical duties of honest and fair witness preparation.

Every case is different. This article should not be construed to state enforceable legal standards or to provide guidance for any particular case. The views expressed in this article are solely those of the authors.