

WHEN SANDPAPERING GOES TOO FAR

by

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A lawyer representing plaintiffs in personal injury actions routinely sent letters by facsimile transmission to treating physicians seeking reports regarding the permanency of injuries suffered by his clients. The letters suggested that, rather than doing a full report, the physician should consider simply making a chart note regarding the finding of permanency and provided a form with suggested language that could be used in the chart note. The letter also contained the instruction "Do *not* place this fax cover, or the 'Chart Note' form with the [lawyer's] fax header on it, in *any* patient file." Somehow, defense counsel was provided with a copy of the letter during discovery and a complaint was made to the Office of Lawyers Professional Responsibility.

Two issues are raised in this scenario. First, is it appropriate to suggest to a witness language they might consider in providing evidence or testimony? Second, is it appropriate to counsel a witness to affirmatively hide the fact that you have suggested to them the language they should use?

Rule 3.4(b) of the Minnesota Rules of Professional Conduct (MRPC), provides, "A lawyer shall not falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law."

The letter to the physicians did not, on its face, ask the physicians to provide false testimony or make false statements in reports or chart notes. It simply suggested that the use of preferred language in a chart note might be a more efficient method of documenting a permanency finding as opposed to doing a full report. In that sense, the letter did not violate the ethical rules. It does, of course, raise the perennial question of how far a lawyer may go in witness preparation.

Clearly, one cannot affirmatively suggest that a witness testify falsely. May an attorney, however, suggest specific words or phrases to be used? May an attorney ask the witness to reconsider their recollection based on other facts? When does "sandpapering" questions or making suggestions like this go too far?

The Restatement of The Law Governing Lawyers, sec. 116,(1), provides, "A lawyer may interview a witness for the purpose of preparing the witness to testify."

In Comment b to that section, the Restatement says: "In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: 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; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. 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."

More problematic in the above scenario was the lawyer's instructing the physician to remove from the patient file all traces of the fact that the lawyer suggested the chart note language.

Rule 3.4(a) of the MRPC provides, "A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act."

It is apparent that the lawyer's instruction to the physician was intended to conceal the fact that the lawyer had crafted the language used in the chart note. Defense counsel reviewing medical records could find such information relevant and potentially use it in cross-examining the physician.

Note that Rule 3.4(a) requires that an obstruction of evidence be unlawful before it runs afoul of the rule. The word "unlawful" may be construed to cover behavior beyond that which is prohibited by criminal law. "[The word unlawful] extends to noncriminal conduct that constitutes fraud, and to the violation of noncriminal legal obligations to produce a document or other material, as in civil discovery." See Hazard & Hodes, sec. 30.4, *The Law of Lawyering*, Third Edition.

In this case, the letters were sent at a time when, presumably, no discovery requests or other requests for information were outstanding. While this precluded a finding that the lawyer's instruction to the physician was unlawful, there can be no question that the request was on some level deceitful.

An attorney seeking discovery of a medical provider's patient file ought to be able to rely on the fact that the records produced will be complete. The intentional deletion of the true source of the language used in the chart notes is deceptive and frustrated the intent of civil discovery.

The lawyer was privately admonished for violation of MRPC 8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation) and MRPC 8.4(d) (prohibiting conduct prejudicial to the administration of justice).