

speaking of ethics

By Erika Stillabower

Following a car accident in which Defendant Driver hit a parked car and careened through an intersection before colliding with a moving vehicle driven by Paula Plaintiff, Paula paid a visit to Alan Attorney to begin the process of filing a lawsuit against Defendant Driver. Eager for business, Alan produced an engagement letter on the spot and immediately commenced work investigating the circumstances surrounding the collision.

Alan quickly located Ellen Eyewitness who, by some stroke of luck, had been perfectly positioned to observe the movements of both drivers in the moments leading up to the accident. She readily recalled the details of the collision and was steadfast in her account of what she had seen, which was highly favorable to Paula. Ellen was also complimentary of Paula's calm and organized demeanor following the accident and told Alan that it stood in sharp contrast to Defendant Driver's panic. Alan was surprised by this revelation since he did not recall Paula telling him that she had had any contact with Ellen the day of the accident.

After Alan commended Ellen on her excellent memory, she modestly explained that it was easy to remember the details because they were wholly consistent with her expectations that morning based upon the alignment of the planets and the trajectory of the moon. She noted that she was somewhat of an expert, having written a book titled *Transportation Disasters and the Stars*. Ellen added that she could always count on a Capricorn like Paula to keep her cool in a stressful situation, while Defendant Driver, a Gemini, would be sure to fall apart.

Nodding politely, Alan returned to his office to consider whether he could convince Ellen to drop the astrology references. He quickly concluded that Ellen's account of the accident was reliable and based upon what she had actually seen—after all, it was consistent with both the circumstantial evidence he had gathered and Paula's own account

'Just the Facts' on Witness Preparation

of the accident. He was, however, uncertain about the rest. Alan confirmed with Paula that she did *not* interact with Ellen at the accident scene, so there was no apparent basis for Ellen's statements regarding Paula's demeanor. He shared his concerns about Ellen's credibility and explained his plan for coaching Ellen through the process of testifying. Paula pointed out that she was known for her preternatural calm and saw no reason Ellen couldn't testify to it.

There are several issues that Alan needs to think about before he makes his next move. The notion that "the facts speak for themselves" does not mesh well with an adversarial system of law in which lawyers compete, subject to evidentiary and ethical rules, to present the most compelling version of those facts to a jury. Witness testimony, particularly from eyewitnesses, is among the most powerful evidence that may be presented.¹ The ethical boundaries for a lawyer's actions in connection with witness preparation may be found somewhere between Rules 1.1(a) (Competence) and 1.3 (Diligence and Zeal) on one hand, and Rules 3.3 (Candor to Tribunal) and 3.4(b) (Fairness to Opposing Party and Counsel) on the other. Operating within these boundaries, it is fair to say that practitioners are ethically *obligated* to help cooperating witnesses to develop logical narratives in furtherance of their clients' interests, so long as the lawyers do not create or solicit false testimony.

This turns out to be every bit as complicated as it sounds. Rule 3.3(a)(4) prohibits lawyers from offering evidence, including witness testimony, that they *know* (in accordance with the "actual knowledge" standard of Rule 1.0(f)) to be false.² Additionally, Comment [7] to Rule 3.3 provides that a lawyer has the option "to refuse to offer testimony or other proof that the lawyer *reasonably believes* is false." (Emphasis added.) However, it is also true that "a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client."³ Rule 3.4(b) further emphasizes that a lawyer may not "counsel

or assist a witness to testify falsely."

But Alan Attorney has much more work to do before he can make any determinations regarding the veracity of Ellen Eyewitness's testimony. In connection with his obligation to represent his client competently⁴ and diligently,⁵ Alan needs to roll up his sleeves and talk to his client and witness. The Restatement (Third) of the Law Governing Lawyers offers an excellent roadmap on witness preparation:

- 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 cross-examination that the witness should be prepared to meet.⁶

Lawyers tend to feel uncomfortable about questioning witnesses' memories of certain events, either because they feel that they are pressuring the witness to recant a previous statement or that they are being overly suggestive with a more helpful, but less truthful, line of testimony.⁷ Yet attempting to resolve discrepancies in witness statements is, in fact, a professional obligation.⁸ Alan can emphasize that he is trying to understand what actually happened so that he has a better grasp of the issues to which each witness can fairly testify and to discover the reason for the divergence. He may



Nick Wiggins

determine that Ellen is completely “out to lunch,” but he could also learn that Paula was so disoriented following the accident that she forgot that Ellen had helped her out of the car and waited with her until the police arrived. Alan should remember, however, that not all discrepancies can be resolved. Ultimately, as discussed above, so long as he has no reason to believe Ellen’s testimony is false, he is ethically permitted to call her to testify.

As to Ellen’s frequent references to astrology, it would be ethically proper for Alan to request that she entirely avoid the topic during her testimony. In their treatise *How to Prepare Witnesses for Trial*, Roberto Aron and Jonathan Rosner included the following objectives for attorneys tasked with witness preparation: “make sure the witness includes all the relevant facts and eliminates the irrelevant facts,” “organize the facts in a credible and understandable sequence,” and “eliminate opinion and conjecture from the testimony.”⁹ This list reinforces the lawyer’s obligation to help the witness craft a credible and powerful narrative, which arguably enhances the accuracy of the testimony. Eliminating irrelevant statements about astrology is likely to have an enormous impact on

how Ellen’s testimony is perceived by the judge and jury, but it in no way affects the truthfulness of her testimony so as to implicate Rule 3.3(a)(4) or Rule 3.4(b).

Finally, Alan should review Ellen’s book to make certain there is no content that could disqualify her as a witness and to prepare her for the possibility that the topic will come up on cross-examination. Since the point of any such questions from opposing counsel would be to discredit her testimony, Ellen needs to have ready a response indicating that her testimony was based on what she saw the day of the accident (since that is, in fact, the truth). The D.C. Bar Legal Ethics Committee, in considering how far lawyers may go in suggesting appropriate language for witness testimony, has noted that

a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. So long as this prohibition is not transgressed, a lawyer may properly suggest language as well as the substance of testimony, and may—indeed,—should do whatever is feasible to prepare his or her witnesses for examination.¹⁰

As such, Alan should feel comfortable providing Ellen with appropriate language to respond to any hostile questions from opposing counsel about her interests in astrology.

Legal Ethics counsel Saul Jay Singer, Hope Todd, and Erika Stillabower are available for telephone inquiries at 202-737-4700, ext. 3232, 3231, and 3198, respectively, or by e-mail at ethics@dcbar.org.

Notes

1 This is somewhat alarming as the Innocence Project has determined that eyewitness misidentification is “the single greatest cause of wrongful convictions nationwide.” See www.innocenceproject.org.

2 See also Rule 3.4(b) and Comment [11] to Rule 3.3. Rule 3.3(b) contains a narrow exception to this general proposition relevant to the false testimony of a client-defendant in a criminal matter; for more on this and client perjury generally, see Saul Jay Singer’s “Speaking of Ethics” article, *The Client Perjury Problem*, Wash. Law., Nov. 2009.

3 Rule 3.3, Comment [6].

4 Rule 1.1.

5 Rule 1.3.

6 Restatement (Third) of the Law Governing Lawyers § 116 cmt. b (2000).

7 In fact, lawyers need to test even the most credible witness statements before they can rely on them in open court. See Rule 3.3, Comment [2], which states that assertions by a lawyer may be made “only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry.”

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– George Washington University School of Law

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1220 19th Street, NW | Suite 510 | Washington, D.C. 20036 | 202-955-4529 | www.CohenandCohen.net

8 In addition to his Rule 1.1 and Rule 1.3 duties, Alan is obligated to follow up with his client by virtue of Rule 1.4 (Communication).

9 See Roberto Aron & Jonathan L. Rosner, *How to Prepare Witnesses for Trial* at 4 (1985).

10 See D.C. Bar Legal Ethics Opinion 234 (quoting Opinion No. 79).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE JIN-HO CYNN. Bar No. 395450. June 19, 2014. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Cynn for six months. In Virginia, Cynn was found to have violated rules relating to intentional neglect of client matters; conflict of interest; a failure to respond to a disciplinary authority, a criminal or deliberately wrongful act that reflects adversely on the lawyer's fitness to practice law; dishonesty; and conversion of funds.

IN RE WILLIAM S. BRADBURY. Bar No. 49502. June 12, 2014. In a reciprocal matter from Virginia, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Bradbury for three years. In Virginia, Bradbury stipulated that he had violated rules relating to fee agreements, meritorious claims and contentions, fairness to opposing party, unauthorized practice of law, and dishonesty.

IN RE MICHELLE HAMILTON DAVY. Bar No. 454524. June 12, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Davy. In Maryland, Davy was found to have violated rules relating to competence, scope of representation, diligence, communication, reasonable fees, safekeeping unearned fees, termination of representation, dishonesty, and conduct prejudicial to the administration of justice.

IN RE LEE E. LANDAU. Bar No. 335505. June 12, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Landau. In Maryland, Landau was found to have knowingly misappropriated client funds.

IN RE ANGELIQUE LAYTON. Bar No. 427713. June 12, 2014. In a reciprocal matter from Colorado, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Layton for six months, stayed upon the successful

completion of a three-year probationary period subject to the conditions imposed by the state of Colorado. Layton stipulated in Colorado that she had violated rules relating to her failure to provide a written fee agreement and engaging in a conflict of interest.

IN RE RONALD M. LEVIN. Bar No. 441575. June 19, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Levin. In Maryland, Levin was found to have made false statements to his law firm regarding his billing, including a fabrication of paperwork documenting false claims for compensation, resulting in an overpayment to Levin of \$151,191.17.

IN RE KEITH T. MURPHY. Bar No. 374115. June 19, 2014. In a reciprocal matter from Michigan, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Murphy for two years with fitness, *nunc pro tunc* to April 14, 2014. In Michigan, Murphy pleaded no contest to charges that he had failed to seek the lawful objectives of his clients, failed to keep his clients reasonably informed of the status of their matters, failed to notify his clients of the receipt of funds in which they had an interest, commingling, failed to refund unearned fees, and engaged in dishonesty.

IN RE MARK K. SEIFERT. Bar No. 358827. June 12, 2014. In a reciprocal matter from North Carolina, the D.C. Court of Appeals imposed identical reciprocal discipline and disbarred Seifert, *nunc pro tunc* to April 3, 2014. In North Carolina, Seifert was found to have committed a criminal act reflecting adversely on his honesty, trustworthiness, or fitness as a lawyer in other respects, based upon his guilty plea to nine felony counts of second-degree sexual exploitation of a minor.

IN RE ROBERT L. SHIELDS JR. Bar No. 463074. June 19, 2014. In a reciprocal matter from Maryland, the D.C. Court of Appeals imposed functionally equivalent reciprocal discipline and suspended Shields for five years or until reinstated to the bar of Maryland, whichever occurs first, and also imposed fitness. In Maryland, Shields stipulated that he failed to deposit entrusted funds into trust accounts, failed to respond to client inquiries, and settled a case without notice to the client.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE MICHAEL A. GIACOMAZZA. Bar No. 462435. June 17, 2014. Giacomazza was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE ROBERT J. GREENLEAF. Bar No. 349795. June 17, 2014. Greenleaf was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE LAWRENCE HOROWITZ. Bar No. 418405. June 17, 2014. Horowitz was suspended on an interim basis based upon discipline imposed in New York.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dccourtydiscipline.org and search by individual names.

IN RE STEVEN B. LEHAT. Bar No. 470131. On January 27, 2014, the State Bar Court of California issued a public reproof to Lehat.

The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted at www.dccourtydiscipline.org. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dccourts.gov/internet/opinionlocator.jsf.

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10 a.m.–12:15 p.m.
Thursday, October 23

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