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The Ethics of Trial Practice

By Ben Rubinowitz and Evan Torgan

Trial work is not for the faint of heart. Attorneys, well aware their clients are relying on them to help overcome life-altering events, must do everything within the bounds of ethics and the law to win their case—while also anticipating and properly handling any challenges created by their own clients' actions. This article explores issues which may arise during client intake and witness preparation, as well as the duty to correct potentially false testimony.

Client Intake and Witness Preparation

The process of intaking a new case can be fraught with ethical danger. For example, if a prospective client informs an attorney that she fell down the stairs in a high-end apartment building but, when questioned, reveals she is unsure about the exact step on which she fell or the exact cause of her fall, can or should the attorney explore the possibility that further facts will support the client's case? If the client suffered a disc herniation versus quadriplegia, should that be factored into the attorney's decision of whether or not to accept the case? In other words, for a contingency-fee attorney, to what extent should the severity of a client's injury impact the decision to further investigate—or whether the case is worth the risk of representing that client?

Attorney: How did the incident on the steps happen?

Client: I'm not sure. I just know that I slipped on something and fell backwards on my butt down a flight of steps.

Attorney: On which step did you fall?

Client: I have no idea.

Attorney: What caused you to fall?

Client: I'm not sure. It was all so fast; I was in tremendous pain and shock.

Attorney: I am not asking you to invent facts; I only want the truth. But I want you to try your hardest to remember all the facts.

What should the attorney do with these answers? Should the inquiry end, and the case be rejected? While this is up to the individual attorney, bear in mind that victims of a sudden injury may not know exactly what occurred until further reflection, and often require an attorney's help to recall and crystalize the issues, which must be done ethically and legally.

Although every case is fact driven, a typical key step in this process is to visit the accident scene with the client; for severely injured clients, photographs of the scene should suffice. In the above example, the attorney should evaluate the entire stairway, including the lighting conditions and each individual step. The attorney should also identify and refer the client to any defects they observe together and inquire what caused the fall. If the client identifies the defect (such as a sunken step or broken handrail) and specifically explains it caused her injury, the attorney can zealously represent her.

As another example, if a potential client describes an incident where he was hit by a huge pharmacy truck and, though he deferred an ambulance at the scene and has not seen a physician, he is now starting to feel pain three days later. As part of the case, an attorney will need to prove, among other things, a serious or permanent injury. How should the attorney handle this?

Attorney: Well, you should understand that it is common after a soft-tissue injury that a person doesn't feel severe pain right away. Often, adrenaline and endorphins kick in, so you get a fright and flight response. Your body goes into overdrive, and you don't realize you are seriously hurt. Do you think that's what happened to you?

Client: I think that's exactly what happened. The next day, my neck was really hurting. It's very tight and stiff now. I couldn't even sleep last night.

Attorney: That is probably from an extension flexion injury from being struck from behind. Where your head and neck are thrust backward into the seat, forward and then back again.

Client: Yes, it all happened so fast, but that is what happened. I remember being thrust into the headrest.

Not only is there nothing wrong with an attorney educating the client on how injuries can occur, but it is also his or her duty to do so. Otherwise, if the client later realizes he has serious injuries, with no recourse and no compensation, the attorney has done a clear disservice. To be clear, this is in fact competent and diligent lawyering required by New York Rules of Professional Conduct 1.1 and 1.3 and is not the creation of false evidence (prohibited by Rule 3.4(a)(5)).

On top of the above, it is critical that attorneys inform a prospective client of the relevant law and how it applies to facts of a given case. Regarding the motor vehicle accident example, the attorney would be remiss in failing to explain the No-Fault law. Even in a case of perfect liability and a definite injury, a plaintiff cannot succeed without meeting the No-Fault threshold, which refers to the fact that a plaintiff may not file a personal injury suit arising from a motor vehicle accident without establishing the following injures, among others: a fracture; permanent loss of a body organ, member function or system; permanent consequential limitation of use of a body, organ or member; significant limitation of use of a body function or system; or a medically determined injury or impairment of a non-permanent nature which prevents the injured person from performing substantially all of the material acts which constitute such person's usual and customary daily activities for not less than 90 days during the 180 days immediately following the occurrence of the injury or impairment. Insurance Law 5102(d). Therefore, it is imperative that the attorney inform the client what awaits him in a typical motor vehicle accident and the hurdles he must overcome:

Attorney: I know you are hurting now, but in any automobile accident case, it is not enough that you were injured. We must prove, if the facts are accurate, that you suffered a serious injury, one that is serious and permanent. Without that proof, we cannot even get to a jury and the case will be dismissed at some

point. What that means is that, without a course of treatment and diagnostic tests that prove your injuries, you cannot prevail. If you do not have diagnostic tests like MRIs that prove your specific injuries, or you stop your course of physical therapy or stop seeing your doctors, they will move to dismiss the case and will have a great chance of succeeding. I am not telling you to get physical therapy or MRIs, or to continue with medical treatment if you do not need it. But without these things you will not be able to succeed in the case. Do I make myself clear? How do you feel about that? What are your thoughts? Because even the greatest lawyers cannot help you with the case if you do not have ongoing treatment.

Attorney: There is another way we can overcome this No-Fault threshold: If we can show you missed 90 out of the first 180 days from work, it would be enough to continue the case. But I am not telling you to stay out of work if you are able to work or need to work. Plus, it is not particularly helpful if you do not require a course of medical treatment and we therefore cannot prove a serious injury anyway. The problem is that if you are better, or we cannot prove permanency, your case will not have a very substantial value. And that type of case would not be worth bringing for you because the key elements of compensation are future medical costs, future impairment of earnings and future pain and suffering. If we cannot prove with supportable facts that these injuries will affect you into the future, there will be virtually no damages of any consequence we will be able to prove. Am I making myself clear? What are your thoughts about that?

Not only is this proper advice and preparation, but it is good advocacy. In fact, good witness preparation is the sine qua non of success at trial. The attorney is certainly able to instruct witnesses and clients about the applicable law and requisite proof. Restatement of the Law Third, The Law Governing Lawyers Sec. 116, comment b. More importantly, an attorney can inform a client about the applicable law even prior to getting the client's version of the facts, as long as it is done in good faith, and that attorney does not believe the client is involved in creating false evidence. Nassau County, New York, Ethics Opinion 94-6 (1994). Therefore, in many (if not all) cases, an effective advocate should let the client know the relevant law and how it may interplay with the relevant facts. Without this strategy, lawyers will not be representing their clients appropriately or to the best of their ability.

Another important factor in witness preparation is educating a witness on the effective use of language and the way to testify to triers of fact. Not only is this appropriate, but often times necessary. As an example, the attorney is planning to prepare a physician to testify in his own defense in a medical malpractice action, but that physician (who arrives disheveled and dressed in jeans, a crooked and stained tie, and a rumpled plaid jacket) describes the following:

Client: When the patient arrived at the ED, she was quadriparetic. She had burst fractures of two cervical vertebra, a cervical epidural hematoma, a transverse process fracture in the lumbar spine, a fractured femur and trimalleolar fracture. We consented the patient and evacuated the cervical hematoma, performed a posterior surgical fusion with cadaver bone, plates and screws, reduced the fractured femur, placed an intramedullary rod, and did an open reduction internal fixation of the trimalleolar fracture. After surgery, the patient remained traplegic. It was unavoidable. There was nothing anyone could have done.

The attorney may then prepare the witness with the following advice:

Attorney: First, Doctor, I suggest that you come to court with a blue blazer, gray slacks, a conservative straightened tie, and dress shoes. It would be good not to speak in highfalutin language or what jurors might feel are pompous sounding medical terms. If you are going to use those terms, please define them as you go, but without the jurors thinking you are talking down to them. And please, do not refer to the plaintiff as patient, but by his name, to show the jury you care about him, which I am sure you do.

Instead, it would be more helpful, if accurate, to say something simple, such as this: Mr. Smith was in terrible shape when he came into the emergency room. He was already paralyzed from the neck down. He had two broken bones in his neck, a large collection of blood outside his spinal cord pushing against it and causing him to be paralyzed, a broken thigh bone and an ankle badly broken in three places. I had our medical team give him detailed informed consent, telling him the risks and benefits of all procedures, including the risks of general anesthesia. I took him to the operating room and performed a cervical fusion which included stabilizing his neck fractures with plates and screws. We had to insert bone from a cadaver or deceased person to support Mr. Smith’s spine. We took out the blood clot pressing on his spinal cord in the hope of stopping the compression and allowing him to move. We straightened and

molded together the fracture in his thigh and put a rod into the canal which houses the bone marrow to keep it supported, straightened and secure. We put plates and screws in the fractured ankle. Unfortunately, while surgery was technically a success, Tom remained paralyzed, because the damage to the spinal cord had been too extensive before he came into the Operating Room. It was a tragedy. I'm sorry I could not do more.

What do you think? Is this consistent with the facts and what you think and feel and what the surgical procedures consisted of?

There is no question that a lawyer may rehearse testimony and may also suggest specific words and phrases to help a witness clarify testimony so long as it does not assist the witness in falsely testifying as to any material facts. The American Law Institute, Restatement of the law Governing Lawyers (2000) sec. 116; State v. McCormick 259 S.E.2d 880 (1979). In fact, it is a critical part of trial advocacy to ensure the witness put his or her best foot forward, testifying truthfully yet compellingly. However, as described below, a problem for attorneys arises when a client has falsely testified.

The Duty To Correct False Testimony

Trial attorneys, often espousing the role as their clients' protectors, are well aware of the protections afforded by the attorney-client privilege. Yet, attorneys must be careful in the event they know a client falsely testified—at which point, they have a duty to instruct the client to cure the false testimony or remonstrate and, if unsuccessful, they must report the false testimony to the tribunal. New York Rules of Professional Conduct, Rule 3.3(a)(3); Committee on Professional and Judicial Ethics, formal opinion 2013-2. Because Rule 3.3(A)(3) only requires that an attorney take "reasonable remedial measures," an attorney's decision of how to proceed often depends on the specific context in which the testimony is given. For instance, if a lawyer knows the client falsely testifies at a deposition, there is no rule compelling the lawyer to immediately remonstrate; at times, it may be reasonable to wait until the filling out and executing the errata sheet. However, if the false testimony is given in court, the correction must be made early enough for the finder of fact to understand that the testimony given was in reality incorrect. Under Rules 3.3(a) and (b), the relevant trigger requiring correction is whether false evidence was offered to a

tribunal and/or whether the offering of false evidence would constitute criminal or fraudulent conduct related to the proceeding before a tribunal. These same rules apply to evidence offered in court, arbitration, or deposition.

To illustrate, the below reflects a situation where an attorney knows his or her office referred a client to the physician who operated on that client, but the client testifies otherwise:

Q: Who operated on your herniated discs?

A: Dr. Goldstein performed the surgery.

Q: How did you get to Dr. Goldstein?

A: My primary care physician.

Q: No, I'm sorry, I meant who referred you to Dr. Goldstein.

A: As I said, my primary care doctor sent me.

Q: Perhaps you forgot, but didn't my office send you to Dr. Goldstein for a consult?

A: Oh. That's right. I forgot, your secretary did.

In a different scenario, the client refuses to follow your lead and correct the testimony. There, the trial lawyer must take a different approach, taking the client aside and remonstrating:

Q: Tom, who referred you to Dr. Goldstein?

A: Dr. Jones, my primary doctor.

Q: Tom, I thought my office suggested you see Dr. Goldstein for a consult?

A: No.

At this point, and again depending on the circumstances, it is best to move to another topic. There is no prohibition on subtly doing this and attempting to correct the problem at a juncture most advantageous to the client and the case, as long the falsity of the statement has been "remedied." At some point, the attorney must explain to the client, that while attorney-client privilege exists, it does not apply to false or fraudulent testimony, and that the attorney has a duty to remonstrate, meaning convince the client to correct the testimony. If the remonstration with the client is ineffectual, the attorney must explain he or she has a duty under the law to report the false testimony to the court. If the client still refuses to correct the testimony, the attorney is obligated to correct the false testimony before the court.

However, the attorney must have actual knowledge of false testimony before a duty to remonstrate and ultimately report applies, although the attorney must be careful because under Rule 1.0[k], "knowledge may be inferred from the circumstances." In other words, attorneys cannot hide their heads in the sand hoping to avoid actual knowledge. Consider this hypothetical: An attorney is about to call an eyewitness to a motor vehicle accident who saw the defendant driver run a red light before hitting the client; a police officer who canvassed the scene and filed a police report tells the attorney that there were no witnesses, and specifically recalls this witness told him he did not see the accident—but simply appeared after the fact. Moreover, assume the attorney has no reason whatsoever to doubt the police officer. The client also informs the attorney that he did not see the witness at the scene. The attorney interviews the witness, who insists both the client, and the police officer were wrong and, specifically, that he was at the scene and did see the defendant run the red light. In addition, he informs the attorney that he had told the police officer he was an eyewitness. Can the attorney ethically call this witness, even though the client and officer maintain he did not see the incident? The answer is this: Even if the attorney has reasonable suspicion (or probable cause) to believe the witness is being less than truthful (see United States v. Parse, 789 F.3d 83 (2d Cir. 2015)), unless the attorney has actual knowledge that the witness is lying, he is not prohibited from calling the witness. However, it is ultimately up to the attorney—based upon his or her judgment call—whether the jury may not believe the witness. The attorney should be mindful that the jury will be determining the credibility of not just the witness, but of the attorney as well.

Effective case intake and witness preparation are critical for a successful outcome at trial. While lawyers cannot tell a witness what to say, they can help with the most compelling way to present the facts. Attorneys can use all the tools in their arsenals to point a witness in the right direction, such as using photographs, witness statements, and expert reports to refresh a witness's recollection. They can and should suggest how to dress and speak simply and effectively. Finally, upon having actual knowledge of false testimony, attorneys should adhere to their duty to take appropriate remedial action to correct it. This includes not only remonstration with the witness, but, if necessary, actually reporting the matter to the tribunal. Indeed, knowledge of these ethical boundaries is required for the zealous representation authorized by the Model Rules of Professional Conduct. American Bar Association, Center for Professional Responsibility, Preamble and Scope (2013).

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