The Substandard Lawyer Performance – And What You Can Do About It

Legal Eagles – Some weeks, we review the appellate cases involving child molestation trials and how they affect Children's Advocacy Centers. But I'll get back to the cases next week. For this week, I'd like to discuss a topic that was raised with me recently several times via e-mail in one form or another. It relates to the courtroom work of lawyers that was perceived as being substandard.

It would be great if I could write that lawyers are always going to be prepared for trial by fully understanding the facts of the case, and understanding your science, profession, industry or trade. Or that they will be able to make all of the proper objections, while at the same time protecting you from unfair characterizations on the witness stand by the other party's attorney.

That would be nice if always true, instead of fiction. So how do you address this sticky topic with the attorneys, whether they are prosecutors or any other lawyer who calls you as a witness?

Take it from a lawyer who has lost cases, and who has had the humbling experience of speaking with jurors after a loss. If I can state the three words that these jurors almost always say to the losing lawyer after a case, it would be these: ***"We just believed . . . ."***

To the losing lawyer, the ***"just"*** in "We ***just*** believed. . ." signifies that the jurors did not believe the lawyer, or the lawyer's evidence, or the lawyer's witnesses. All of these are failings of the lawyer and no one else. So when lawyers do poorly at trial, they need to know why.

Deciding when to discuss lawyer malfunction can be tricky. Getting in the lawyer's grill right after trial, or in the day or two following, may be counterproductive whether the lawyer is thick-skinned or not.

My view of "when" is similar to my view of when a witness should start preparing for trial. A witness should start preparing for trial the day she opens the file, or the day a case is assigned, or the day she meets with the client. In other words, a witness should prepare for trial far in advance of the actual court date, when each step in the inevitable but slow march toward a trial date can be properly documented, properly completed, and professionally done.

But more of the "when" later. First, my theory of talking to lawyers about their so-so performances has twin pillars, and each should properly be in place.

The first pillar is be careful about jumping into this conversation before you have done your part and have a checked checklist that looks like this:

- ✓ My CV is updated, is as brief as possible, is professional and packs a punch.
- ✓ I have completed all necessary professional trainings or certifications, or am in the active process of doing so, and continue to complete ongoing trainings in my area.
- ✓ I "own" my professional area, in that I am aware of all of the literature, standards, protocols, journal articles or treatises. I stay informed about my profession on an ongoing basis. I know the criticisms and attacks that are out there, and have carefully reviewed their points of view.

- ✓ I am aware of the legal rules that affect my testimony, such as hearsay, child hearsay, rules related to expert testimony, rules related to the "ultimate issue," witness bolstering, the rule of sequestration, etc.

- ✓ I give back to the community, whether large or small, whether while I am at work or in my own time, in areas related to my professional pursuits. When I am on the witness stand, it will become apparent that I can talk the talk because I walk the walk.

- ✓ When I am first assigned a case, or a file, or a client, I have a standard, habitual routine of opening files and completing paperwork that is so meticulous it makes me look like I trained with the Marines at Parris Island.

- ✓ When I add materials to my file, I do so based upon my skill, training, experience and protocol. When someone looks at my file two years from now it will make sense to him – and me.

- ✓ I understand my role, and I understand my limitations. I am a (detective)(forensic interviewer)(counselor)(child and family advocate)(child protective services professional). My activities will reflect such, and I do not overreach in my role or my responsibilities.

- ✓ When I learn that I am going to be called to testify, I will make sure that I know my file inside out, with no exceptions.

- ✓ When I think of testifying in court, I will ***welcome*** the opportunity to tell what I know or what I have seen or what I believe.

And guess what? It's not even an exhaustive checklist! But a checklist like that will put you in a position where you're more prepared than a good number of lawyers ever will be. A checklist like that will allow you to have credibility with the lawyer, and an indication that you are doing – and have done – everything you can to be an effective witness at trial. Ultimately, your good reputation will also speak for you. A conversation between a witness who has done a poor job in preparing and testifying at trial and a lawyer who has done a poor job at trial is a sorry conversation indeed.

That leads to the second pillar, related to "when" to talk to the lawyer. My view is based upon the common-sense "preventative medicine" approach. If I eat healthy, exercise, go to the various doctors on a scheduled and routine basis, then chances are I won't have to put out the medical fires and live in medical crisis.

Trials are that way. What good is it, after all, to walk up to the losing lawyer afterward and tell him what a lousy job he did because he didn't ask you this, or anticipate that, or understand your concerns in these areas? And so we've talked over time in these Legal Letters about the importance of being able to go to the prosecutor or the lawyer calling you as a witness ***prior to trial*** when it does the most good and tell her ***your concerns.***

Every witness, even most of those seasoned CAC detectives who've been on the stand countless times, have concerns. So the second pillar, after you've established the first, is to be able to discuss with the subpoenaing lawyer your concerns ***prior to trial***.

As part of this, you can learn what the lawyer is intending to show or prove with your testimony. As part of this, you can discuss the likely topics that will be raised by the other lawyer. As part of this, you can inform the lawyer who subpoenas you the manner in which you're most comfortable explaining the

information that you're going to testify about. As part of this, you can inform the lawyer what you ***don't*** know or what ***you haven't done*** as part of your involvement in the case.

And finally, as part of this you can discuss the ***wild card*** topic that is on your mind. These relate to the times you've been on the witness stand in the past and had bad experiences, some of which were because the lawyer who brought you was not fully prepared. These, I believe, are the times to discuss your concerns and even your constructive criticisms, before the trial when they can be addressed. It takes being proactive on your part, but it allows you to go into your testimony with your eyes wide open. Good luck!

Best regards.

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Andrew H. Agatston
Andrew H. Agatston, P.C.
145 Church Street, Suite 230
Marietta, Georgia 30060
(770) 795-7770
ahalaw@bellsouth.net
www.AgatstonLaw.com