For Witnesses, It's the Fear of the Unknown

Legal Eagles – It's the fear of the unknown that is tough on so many witnesses. If you compound that with a prior bad experience on the witness stand, or two, or three, then you have a recipe for the proverbial deer in the headlights.

But this topic really should involve the topic of a lawyer preparing witnesses for trial, and it goes straight to the heart of why so many people are intimidated by the thought of sitting on a witness stand and testifying in court. The fear of the unknown caused by inadequate trial preparation.

First, let's briefly talk about two cases to define the problem, and then I'll provide some suggestions for being prepared to testify in court.

Case #1: Bryant v. State, Georgia Court of Appeals, Case No. A10A0789 (Decided August 3, 2010).

Facts: The Defendant was indicted for aggravated sexual battery, aggravated sodomy, aggravated child molestation and child molestation related to alleged acts involving his 9-year-old stepsister. The acts allegedly occurred between December 31, 2004 and June 2, 2005.

The victim's mother was on the stand, testifying on cross-examination. She was asked by the defense lawyer whether she knew when the alleged molestation occurred. Her response raised the possibility that some of the alleged acts occurred after June 2, 2005, unbeknownst to anyone else in the courtroom. Part of her response was, ***"Yesterday there was a lot of stuff (that) came out at the psychologist that I did not know. She told the psychologist that it happened multiple times during the day, so I believe her."***

You Legal Eagles can spot the problems with this testimony.

1. Hearsay: "She told the psychologist that it happened multiple times during the day." Hearsay (and really double hearsay) – it's what someone told someone else, and the "someone else" is not in the courtroom to testify about the child's comments first-hand.

But you might ask: What about the Child Hearsay Statute? Isn't that an exception? No, not in this case. The child's statement was not made directly to the mother, who could have then relayed the child's statement if it involved child sexual abuse (at least according to Georgia's Child Hearsay statute -- your state may differ). Instead, the child's statement was apparently made to a third person (the psychologist) who was not the person who testified about the statement at trial. That causes the statement to be inadmissible, even under the Child Hearsay Statute.

2. Bolstering testimony. The mother concluded, "I believe her." No can do. The jury determines the credibility and believability of witnesses, including the alleged victim in this case.

But there is a more subtle problem with this testimony which can cause concerns, and in fact did cause concerns in this case. ***"Yesterday there was a lot of stuff (that) came out at the psychologist . . ."***

"Yesterday." Uh-oh. If you're thinking like a lawyer, you're going through things in your head: *Trial is today. Yesterday, there was important information that involves the allegations of molestation. Did I know that? Did the opposing lawyer know that? Was the opposing lawyer entitled to know that through the discovery rules? Did I discuss this with my witness before putting her on the stand? Did I instruct my*

witnesses to keep me updated with all current circumstances that go to the heart of this case? Did I, on my own, contact my witnesses to see whether there are any updated circumstances that go to the heart of the case?

Result: Mistrial. The defense counsel asserted that he had no notice that there was alleged molestation that occurred after June 2, 2005. According to the Court of Appeals opinion, ***"The trial court expressed dismay that the prosecution, defense counsel, and the court were learning about the child's recent trip to the psychologist on the first day of trial. The judge then asked defense counsel whether he wanted a mistrial. Defense counsel indicated that he did, and the trial court granted the request."***

Case # 2: Goss v. State, Georgia Court of Appeals, Case No. A10A1578 (Decided August 3, 2010).

Facts: The Defendant was convicted of child molestation and aggravated sexual battery. He complained on appeal that his trial counsel provided ineffective assistance for failing to do a number of things, including failing to obtain certain documents.

As it relates to the documents, the Defendant complained on appeal that his lawyer failed to obtain DFACS (CPS) records, school records, medical records, mental health records, and the personnel records of the police officers involved, among other things.

Result: Conviction affirmed. The Court of Appeals denied Defendants appeal as it relates to the document issue because the Defendant's appeal failed to provide any argument or legal authority to support his document issue argument. But the case illustrates loud and clear that there are often signs that defense counsel will fail to adequately prepare for trial by, in this case, allegedly failing to obtain what might be important documents for use at trial.

In sum, we have seen evidence of incomplete preparation on both sides of the aisle in these two cases today.

So what can you do about it in order to be more comfortable and confident that you're prepared to testify?

The answer requires multiple discussions, which we have had in one form or another in past Legal Letters. For purposes of today's Legal Letter, I will focus on just one important aspect – what ***you*** can do instead of waiting by the phone to be prepped by the lawyer calling you as a witness.

ONE: Let the lawyer who is calling you as a witness know that you do not believe you are fully prepared to testify, if in fact you believe that you are not fully prepared to testify. This tends to draw attention from lawyers.

If you feel this why, then don't be satisfied with a response such as, "You'll be fine. You've done this before." Each time is different, and each case is critical. Even the most seasoned witnesses have concerns. If you don't believe me, ask a veteran CAC detective.

TWO: Know why you are not fully prepared to testify, and be able to express it to the lawyer. Do you know the reason you are being called to testify? Do you know what facts you are being called on to show? Do you know what the issues are that the defense has focused on as it relates to your interaction with the child in the case? Do you know whether the defense has identified an expert to critique your work product? Is there anything in your file that worries you, in any way? Do you believe that the

lawyer calling you as a witness fully understands the complete extent and scope of your involvement in the case?

THREE: I am putting this at three, but it should really be in place before **ONE**. The best case scenario is to have in place a system where getting prepared for trial occurs well in advance of trial. I am in civil trial practice, so I fully understand that my definition of "well in advance of trial" differs from a prosecutor's definition. It's just the nature of the two systems of justice, and the enormous caseloads many prosecutor's offices have. I have heard of and seen the situation where prosecutors who believe they are trying Case A on Monday, and when they show up on Monday – for one reason or another – they are told by the judge to be ready to try Case B. Incredibly hard.

But we also know that these situations are inevitable, so there are two ways we can address them. The first way is to believe that due to the nature of the criminal justice jury trial system, we just have to acknowledge that being fully prepared for trial might not occur in every case. The second way, which is the SuperWitness way, is to say "hogwash" because there is much that SuperWitnesses can do on their own to be prepared. A system can be put into place that case-tracks your files, and can tell you at what point, from indictment to trial, a case is in. For example, once a case reaches the point where it is first placed on a trial calendar, plans can be made to begin the trial preparation process. A system can be put into place to communicate with the prosecutor's office to determine the case status, and whether, in their best information, the case involving you is heading toward trial. That is the point to communicate any concerns you have, well ahead of the actual trial date.

FOUR: By discussing that "every witness has concerns," I am absolutely not stating that you should doubt your abilities. Everyone on this list has one of the greatest advantages that there is for a witness, because everyone on this list in some shape or form is in the business of assisting in safety. Safety is a concept that every person who serves as a juror wants, for themselves certainly, and hopefully for their family and community. When you have done your job in a way that places safety at the top, then it can lead to remarkably important testimony. There is much more to this topic, but that's for another Legal Letter. For purposes of this one, the important thing to stress is that when a witness realizes that she has testifying concerns, that recognition is a ***strength*** because it can be addressed ***before*** she raises her right hand and promises to tell the truth.

Best regards.

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