Legal Letters by Andrew Agatston – The Legal List (8.28.12)

SuperWitnesses and Calling in the Calvary

Gooden v. State
Georgia Court of Appeals
Case No. A12A0390
(Decided May 18, 2012)

Facts: The Defendant was convicted of forcible rape, incest, terroristic threat and simple battery of his 17-year-old daughter, identified as "J.G." Part of the case involved the testimony of a pediatrician who examined the victim on the same night of the crimes.

The doctor testified that, prior to conducting the physical examination of J.G., he interviewed J.G. by following an assault checklist, designed to obtain both general medical information and information specific to the alleged events. This testimony between the prosecutor and the doctor followed:

Q: Specifically on your checklist, was there anything that was consistent with a victim of sexual assault?

A: I'm sorry, do you mean in terms of the history or in terms of the physical exam?

Q: In terms of the history. Let's stick with the history.

A: I mean, she seemed reasonable, she was fearful, but I believed she was telling me the truth.

Result: Following defense counsel's objection to this answer, which was sustained, and following defense counsel's motion for mistrial based upon improper bolstering of the victim, which was denied, the Defendant was convicted. The conviction was affirmed by the Court of Appeals. As it relates to the improper bolstering argument, the Court of Appeals determined that the trial judge was able to "fix" the prosecutor's mistake in eliciting this clearly improper bolstering testimony by giving the jury, immediately after the improper testimony, the following instruction:

"Ladies and gentlemen, as instructed in your preliminary instructions, credibility is strictly a matter for the jury. And I caution you, I caution the witness, I caution the State. So the relevance of any person's testimony on that fact is strictly—well, it is strictly irrelevant. And, therefore, that is ordered stricken, that testimony. And you are ordered to strike it from your mind, recognizing that it is solely for you, you are the sole judges of the credibility of witnesses."

My questions for you Legal Eagles is this: What just happened? How did that kind of testimony get injected into trial?

Pre-trial prep blues

I am not privy to the specifics of this case, but I can tell you that a main cause of eliciting improper testimony is the lawyer's failure to properly prepare witnesses.

The "improper bolstering" rule is one of the most basic rules that lawyers should tell their witnesses during pretrial prep sessions in all cases, but has special significance in child molestation cases.

While "things happen" in trials, even in situations where pretrial prepping was terrific, we are going to assume without deciding for today's discussion that there was a lack of pretrial prepping and coordination between the prosecutor and the physician.

And this goes back to the "long distance learning" talk I gave this week. One of the questions at the end -- from a physician no less -- targeted this very point: What happens when we are not properly prepped by the lawyer? And further, what happens when it is a recurring problem?

I believe in a 2-prong approach, with a third prong in the case of "emergencies."

Prong 1: Practicing "Preventative Medicine"

You are in a profession where it is inevitable that important decisions affecting children will often be made in a legal forum, whether at trial or at some legal proceeding short of trial, such as a hearing.

As such, a reliable prediction can be made well prior to your legal involvement regarding (1) the circumstances under which you will be brought into a legal proceeding and (2) the potential topics for your testimony.

This is what I mean by practicing "preventive medicine." Just like your doc wants you to eat veggies, rest, and exercise as part of her preventative medicine protocol, CACs can symbolically do the same thing when it comes to legal matters. How? Many ways, but here are four:

1) Have your organization's lawyer stay updated on the legal cases, statutes and trial trends that directly impact the cases in which you are involved. Since there are a number of professionals in your organization that perform a variety of specific roles, this system requires an analysis of legal matters that impact the spectrum -- forensic interviewers, therapists, medical, etc. The reason this is great "preventative medicine" is because it provides real-world examples of what is happening in the legal cases involving child molestation.

2) Have "witness experience" meetings (MDT or otherwise), not to critique but to analyze. Listening to the team member's experience at trial (after the trial is over!) can provide her and the other team members with important information to assist the next time. An added feature would be to bring your organization's lawyer to these meetings to provide feedback. Variations on these themes would be invite the prosecutor to run a meeting and speak in general terms about trial testimony.

3) Create a list of general "concerns" related to all cases that you want addressed prior to being called as a witness in all cases. You know what they are: you want to be adequately prepared for trial; you want to know what "traps" are out there regarding your testimony; you want to

know what purpose you are being called to testify; you want to know the disputed issues that might relate to your testimony; you want to know whether there is an opposing expert or opposing witness who will disagree with your testimony and attack its validity, and on what basis. There are others.

4) As Legal Eagles, we want to fully understand the legal concepts that directly impact our professional roles. If there is a statute that speaks to your profession, have an advanced understanding of it. For therapists, e.g., know your state's client confidentiality statute. For all witnesses, know hearsay, child hearsay, the witness bolstering rules, rules related to credibility of witnesses, rules related to expert testimony, rules related to bias witnesses, and so forth. The competent and qualified attorney of your choice will assist you with this. "Preventative medicine" creates confidence, but also resolves many of the "prep" issues that would need to be addressed prior to trial.

Prong 2: When the subpoena arrives

When the subpoena is served, don't wait -- take action. For purposes of this Legal Letter, we will assume that there is no need to respond with a Motion to Quash or other legal response that attacks the legal validity of the subpoena. (We have addressed these issues in other Legal Letters, and we'll do it again soon.)

Even absent attacking the subpoena's validity, Legal Eagles still respond with a calm and routine plan. Immediately contact your CAC's lawyer and let her know you were served, even in routine cases. Sometimes "routine cases" still might call for a legal response.

Next, contact the prosecutor who served you if you have not heard from him first. Don't wait. Tell him that you were served, that you would like to know the likelihood of the case going forward, and that you would like to schedule time to prep. Even if it is after hours. Even if it is by phone. When you are told that prep is unnecessary, politely respond that you have a list of

concerns that you would like to discuss so that you will be a confident and effective witness. (You already made the list!) When you are told the case might not be reached until a future calendar term, tell him that you would like to have this conversation again once the next trial calendar period is known.

Prong 3: Call in the calvary!

On the civil side, I've tried at a at least 70 cases over 17 years. At this stage, I would never fail to (1) interview a witness (2) prep that witness and (3) address all of a witness's concerns. I understand that criminal practice is different than civil practice and that there are only 24 hours in a day. I understand that many prosecutors who have monumental case loads are very successful obtaining convictions, with prep work that ranges from nominal to extensive. But we are talking about meeting the needs of the witness who is being called on to perform a solemn duty in a serious matter and has the right -- and need -- to be as fully prepared as possible to perform the role. These are things all trial lawyers understand.

Prong 3 is appropriate if Prongs 1 and 2 fall short. Set a meeting, away from trial dates when passions are low, 1-on-1 or if appropriate with additional interested parties, to mutually and professionally create a reliable framework to ensure that when the time to testify arrives, you are able, and ready!

Best regards.

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