

ANNUAL MEETING 2008

Commercial & Federal Litigation Section Questions and some answers on witness prep ethics

By Alessandra Scalise

The second part of the Section's Annual Meeting program used a hypothetical case to illustrate some of the more controversial ethical issues involved in witness preparation.

The fictional case involved a woman, played by panel moderator Ellen Yaroshefsky of New York (Cardozo Law School), who lost a finger while using a weed trimmer when the trimmer jammed. Michael S. Ross of New York (Law Offices of Michael S. Ross) played the role of the woman's attorney in a staged client interview. The panel members posed questions and provided answers.

The Law

Some of those questions and answers included:

--Does an attorney always have to tell a client what the law is? "The focus would be to tell the client [he/she] needs to be truthful [and] to tell the client the theory of the case and the law," said Jeremy R. Feinberg of New York (Statewide Special Counsel for Ethics and the Commercial Division). Panel co-chair James M. Wicks of Uniondale (Farrell Fritz, P.C.) agreed that the attorney should "tell the client what the law is." Hon. Denny Chin of New York (United States District Judge, SDNY) stated [it is] "perfectly fine to tell [the client] about the law but not to commit a fraud."

Another question:

--Is it acceptable to use a photograph or photographs to refresh witness recollection? Because attorneys have a "duty to represent clients zealously, [it is] fine to use documents or photographs to refresh recollection," said panel co-chair Anthony J. Harwood of New York (Labaton Sucharow LLP).

Best For The Case

The questions continued.

--What should an attorney say if a client asks what is best for the case? Harwood said that question is "in a gray area [and] not one [the attorney] should answer." Chin agreed, saying, "if [a] client is soliciting [the] case from [the attorney], this is not good."

Ross said the answer depends on the attorney's "appetite for risk." Geri S. Krauss of White Plains (Krauss PLLC) agreed with Ross, explaining that some attorneys go as "close to the line as they can without going over it.

"Sometimes clients are dense [and there is a need to] walk them through the law," said Ross. When doing so, "speed and tone is a factor as well."

Another question:

--Should an attorney accept what the client says as the truth? The answer is "if [the] client changes [his/her] story, then the attorney has an obligation to get to the truth," said Ross. "The presumption of truth gives way to the duty to explore things."

--Can an attorney suggest better words for a client to use when the client answers a question with the word okay? It is acceptable "to probe what a witness means by okay, [it is] not a problem helping [a] client articulate what [he/she] means," said Chin. Feinberg agreed, noting the attorney should ask a client "what do you mean by okay?"

Vincent J. Syracuse of New York (Tannenbaum Helporn Syracuse & Hirschtritt LLP) was program chair. Carrie H. Cohen of New York (United States Attorney's Office, SDNY) is Section Chair.

The program sponsors were: JAMS, FTI Consulting Inc., and TC Reporting.

Scalise is an attorney and a member of the State Bar News Annual Meeting writing team.