Lawyer as Witness: Thoughts on Professionalism

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As Justice Harold G. Clarke noted in his article, "Professionalism: Repaying the Debt," a professional is "a member of a group which provides an essential service in which the public has a vital interest and requires of the performer extensive training and the exercise of qualitative judgment." Justice Clarke went on to argue that "essential service," "vital public interest," "extensive training," and "qualitative judgment" constitute the key phrases of the definition and to advise that "every lawyer would do well to use these phrases as a checklist for his or her everyday activities." This is no less true when acting as a witness in a proceeding that seeks often to attack that very professionalism.

Essential Service

Professionalism for a lawyer witness begins before a lawyer is even called to the stand or indeed before that lawyer's actions are called into question at all.

As a lawyer's decision and actions in each case will later be the subject of such lawyer's testimony once called to the witness stand, those decisions and actions must be conducted both ethically and to the highest degree of professionalism. Most significant is the lawyer's duty to communicate fully with their client, fully investigate any issues raised by that client, and keep good records of the representation. This serves to further the essential service provided during representation and to both prevent many of the common claims raised against a lawyer's performance and to prepare the lawyer to address any claims that may later be raised.

Similarly, a lawyer for the State must ensure they engage in open and honest communication with the defense throughout the pendency of the case. As to issues with *Brady* evidence, a State attorney's ethical and professional requirements demand that such attorney does not try to "split hairs" as to what evidence should be disclosed. Unless there is a very good reason to keep certain information private, erring on the side of over-inclusion of potential *Brady* evidence will both satisfy these professional obligations and prevent the need to answer for an improper failure to disclose.

If the lawyer, either as counsel for the defense or for the State, practices with ethics, integrity, and professionalism, such actions will be easily upheld against future attacks, and indeed may short-circuit such attacks.

Vital Public Interest

"To the courts, and other tribunals, and to those who assist them, I offer respect, candor, and courtesy. I will strive to do honor to the search for justice." A Lawyer's Creed.

Once a lawyer has been called to answer as a witness, professionalism dictates that such lawyer provide full and complete answers to the best of their ability. Both "falling on one's sword" or, in the alternative, failing to disclose errors or omissions during representation when asked, act as a disservice to public interest, along with a clear violation of one's ethical duty of candor to the Court. *See* Rule 3.3.

A hearing where a lawyer will be called to answer for their professional decisions acts as a check in the justice system. That system cannot function unless the parties involved in it each carry out their role with integrity, and the question of whether the system has indeed functioned properly in a particular case cannot be evaluated without the candid testimony of those parties.

Neither the defendant, nor the justice system, nor the community as a whole is served by the failure of lawyers to provide complete and accurate information regarding their actions, thoughts, and reasoning when called to do so in court.

Extensive Training

As with "essential service," some of the extensive training will occur before a lawyer is even called to answer for their actions in a case. A lawyer's decision to take or refrain from taking certain actions will necessarily be informed by both their legal experience and research and their investigation into the facts and circumstances of a particular case. Those functions must all have occurred before the lawyer witness can provide that information in a post-trial hearing.

Additionally, however, "training" can occur once a post-trial hearing has been set, but before it takes place. For the lawyer witness to provide accurate information at the hearing, such witness must first review their notes and any file they may still possess. Both the defendant in a criminal case and the public at large are hurt when the lawyer witness fails to do even the most basic review of their actions in a particular case prior to providing testimony.

The lawyer witness should also endeavor to make themselves available to discuss the case with the parties who have called them prior to providing their testimony. As with review of a lawyer's notes, the public interest, the interest of the defendant, and the interest of the courts are best served by a witness who has prepared to give the fullest testimony and can speak cogently on the issues that have been raised regarding their actions.

Qualitative Judgment

Finally, the lawyer witness is to use their qualitative judgment as a professional throughout the testimony itself. As a matter of professionalism, the lawyer witness should give full and complete answers to the questions posed. As a corollary, however, the lawyer witness should listen to the question posed and answer that question completely, but without adding superfluous details that may open the door to issues for which there is no claim being made and potentially for which their client did not waive confidentiality. *See* Rule 1.6; *Waldrip v. Head*, 272 Ga. 572, 578-79, 532 S.E.2d 380 (2000) (holding that a habeas petitioner who asserts claims of ineffective assistance of counsel waives attorney-client privilege and work product protection only to the extent necessary for the attorney to defend against specific charges of misconduct) (overruled in part on other grounds).

This ethical limitation on testimony does not apply to the same extent to a State attorney providing testimony regarding a *Brady* claim or plea negotiations, but the need to utilize qualitative judgment holds true. The State attorney must listen to the question asked and provide a complete answer to that question without presenting evidence that may be non-responsive to the issue at hand. Whether additional details would be relevant to the determination of a particular *Brady* claim or would prove to confuse the issue would, of course, be a matter of judgment on the part of the attorney witness.

In sum, a lawyer's duty to practice with the highest levels of ethics and professionalism is no less significant when called to act as a witness than it is when engaging in the practice of law.