Oh, What a Tangled Web We Weave, Counselor

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To the Forum:

I am a longtime New York civil personal injury attorney. I thought that I had seen it all. Yet last year, while serving as a plaintiff's trial attorney in a civil battery case, I had to call for testimony a friendly and key eyewitness, a grandmother, who had clearly seen the battery from her front porch. She had never testified in court; I met with her two days before trial. Picture the scene: trial is progressing; her time to testify arrives; I see her grandson in the courtroom at the appointed time and so I know that she is outside waiting for me to call her to the stand. The judge says curtly: "Next witness." I ask the judge for a few seconds so that I can send my paralegal to the hallway to get her. He says yes; the paralegal goes. Thirty seconds later, the paralegal opens the door and holds it for her – in she comes, in a wheelchair, struggling to move. This was a surprise to me – she had been perfectly ambulatory the two days before during prep. As I approached the witness, I whispered, "What happened?" She looked up at me, smirked, and said, "My grandson thought I would seem more credible in a wheelchair." I froze. The judge looked at me impatiently, the jury was staring at the witness. . . . What to do? Too late; she was wheeling herself toward the witness stand. Do I address the subject with her in open court, or let it lie? Should I ask her about her wheelchair, more than likely eliciting a lie from her? Impeach her and discredit my own witness and quite possibly sink my client's case? But her substantive testimony would be true and honest! What action did I owe to my client? To the court? To opposing counsel? "Get started, counselor," the judge instructed. I decided to completely ignore her wheelchair and simply elicit from her exactly the testimony that I had prepped with her. This went perfectly well, and to my knowledge she never lied. Upon her cross-examination, miraculously, the opposing counsel too made no mention of her wheelchair. We won the trial and to this day I have no reason to believe that her feigned disability made any difference in the outcome. But this was a very negative experience. And it has haunted me for a year. There was a multitude of ways in which it could have gone worse than it did. Did I do the right thing? What should a lawyer in my position have done?

Sincerely,
Marcus DeLafayette

Dear Marcus:

Your question raises an interesting and important ethical dilemma that lawyers often face in varying degrees of severity. Many trial lawyers are familiar with the incentive to make one's own client come off as likeable as possible to the jury, even if that means the lawyer is presenting the client or even him or herself in some peculiar way.

It begins with showing small truths to the jury that are irrelevant to the claim being tried, such as eliciting testimony from a female witness about how she dotes on her children or has a husband who does charity work. It may escalate to allowing the jury to believe the most minor misrepresentations, like the lawyer who dresses in

a $1,000 suit and gold watch to get his client acquitted of petty theft (why would the defendant need to steal if he can afford such a high-priced lawyer?), or the lawyer who wears shoes with worn-through soles and stands with one leg bent at the knee, the better for jurors to notice them (what a simple, homely, credible old soul). A lawyer who keeps on ascending the ladder of connivery may soon enter the realm of outright lying to the jury. Fortunately, most lawyers do not stretch the rules to that extent.

And yet, as honest and conscientious as an attorney may be, it is a fact of life that witnesses and clients sometimes are not. Many lawyers know this well enough from their experience in dealing with opposing witnesses, but the possibility of one's own witness going rogue and threatening to drag the lawyer down is a real ethical danger, especially to civil lawyers who are likely to be less used to this hazard than lawyers in criminal cases. A trial can be a crucible of pressure, in which conflicting values and loyalties clash; a lawyer does owe duties to their client, to the court, and to opposing counsel, and it is necessary to have a sense of how to manage conflicting duties without violating one of them.

The Forum previously examined a lawyer's duty of candor in a situation where a client led his lawyer to believe strongly that he would knowingly give false evidentiary testimony.[1] Your question implicates the distinct issue of how a lawyer should handle a witness's attempt, through non-evidentiary conduct, to deceive the court and jury as to their credibility.

A Lawyer's Duty of Candor to the Court and Opposing Counsel

A lawyer has a duty of candor to both the court and to opposing counsel. Rule 3.3(b) of the New York Rules of Professional Conduct states that "[a] lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[2] The rule obligates lawyers to take some action to prevent fraudulent conduct by some "person" in a trial, whether that be their own client, or a friendly witness, or an opposing witness. "Fraudulent" does not have the same meaning that it has in tort law: "Such conduct includes, among other things, bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding; unlawfully destroying or concealing documents or other evidence related to the proceeding; and failing to disclose information to the tribunal when required by law to do so. For example, under some circumstances a person's omission of a material fact may constitute a crime or fraud on the tribunal."[3] In other words, fraud is an attempt to change the outcome

of trial through trickery, rather than winning honestly on the merits.

It is important to recognize an important aspect of this rule: It regulates conduct. There are numerous rules that regulate a lawyer's use of testimony, evidence or material information. Lawyers shall not knowingly "make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact" made by them,[4] or "offer or use evidence that the lawyer knows to be false,"[5] or "use perjured testimony or false evidence,"[6] or "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."[7] Unlike those rules, Rule 3.3(b) regulates "conduct," and does not condition its regulation of conduct on whether it is "material" or "immaterial," or whether it successfully alters the outcome of the proceeding. All that matters is that the conduct be criminal or fraudulent.

What your witness did, Marcus, was not done by the lawyer (and thus escapes Rule 3.3(a)(1)), and also is unlikely to be considered "evidence" or "testimony," as a witness's mere physical appearance or demeanor is not usually deemed formal evidence, thus arguably falling outside of Rules 3.3(a)(3) and 3.4. But because your witness's misrepresenting herself physically to the jury was "conduct," you are responsible for taking remedial action out of your duty of candor if you knew that her conduct was "criminal" (doubtful here) or "fraudulent" (possible here).

We believe that you should have acted. Although her physical appearance or demeanor was not evidence, it could be a factor used by the jury in deciding credibility. A witness who puts on a suit and tie for the first time solely to appear credible to a jury may well have similar motives. Surely, such acts – putting on a nice suit, using a wheelchair – fall onto a continuum, from benign to malign. Malignity may depend upon the case: A plaintiff's feigning a physical disability due to medical malpractice in a case for that medical malpractice is much worse than here.

Your witness's conduct falls into an in-between gray area. It may not be a representation that is material to the claim being tried. It may have no outcome-determinative effect at all, especially if the jury takes its job seriously and is well instructed. It is innocuous to coach a witness to wear a suit to court, even if they have never worn one. It would cross the line to coach the witness to use a wheelchair. While you did not coach the witness, you, nonetheless, should have acted because of how far along on the benign-malign continuum this fell. Your witness arguably crossed the line into fraud on the court, as her stated purpose was to deceive the jury into finding her more credible.

A Lawyer's Duty Not To Knowingly Allow False Testimony

You should not attempt to rely on the grayness and ambiguity of the question to justify absence of remedial action on your part, because even if her conduct was not technically fraudulent, the risk of your witness's deception entering oral testimony as perjury was high: Opposing counsel could have, innocently, asked the witness why she was in a wheelchair. And she would have probably answered with a falsehood. Or perhaps the witness, unprompted but trying to act out her part, would mention a disability.

"We believe that you should have acted. Although her physical appearance or demeanor was not evidence, it could be a factor used by the jury in deciding credibility."

Rule 3.3(b) requires a lawyer to take remedial action once he or she has knowledge that a person has engaged in fraudulent deception in court. Furthermore, Rule 3.4(a)(5) requires that a lawyer shall not knowingly "participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false."

You may not have known in advance whether she would so testify, and you got lucky that she did not, but had she so testified, you would have known that she had lied, and you would have been obligated to take remedial action immediately anyway. This would have been even worse, as the court would see that you had allowed her to testify in a wheelchair while you knew that she was not actually disabled. As to such testimony: "the lawyer cannot ignore an obvious falsehood."[8] And note that even if her merely being in a wheelchair was not criminal conduct, perjury is criminal. Once she testifies falsely, the lawyer who knows that it is false becomes ethically complicit if he or she does nothing.

And do not forget about Rule 8.4: a lawyer shall not (c) "engage in conduct involving dishonesty, fraud, deceit or misrepresentation"; or (d) "engage in conduct that is prejudicial to the administration of justice." Conduct is

not just action; it is also inaction, and inaction in the face of a need for action is misconduct.

In sum, like the proverb that one should not allow one's cattle to graze on one's own land too close to one's neighbor's land, for risk that the cattle will cross the boundary, a lawyer should avoid ethical gray areas. Your witness's conduct was either fraudulent to begin with, or was so close to it that you should have acted to defuse the situation before it could escalate, even if it did not ultimately escalate.

Balancing a Lawyer's Duties to Client, Court, and Opposing Counsel

We acknowledge that this is easy to say, and difficult to do. Calling the issue to the attention of the court could have resulted in the witness being sent home without testifying, possibly costing your client the case. And if you are handling the case on a contingency fee basis, it may well sting even harder.

While an attorney must, most fundamentally, represent a client's interests, the duty of candor is paramount over the client's interests. "A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal."[9]

Your witness created a bad situation for both you and your client, and it is understandable that you did not want to risk blowing up your key witness by broaching the subject, as that might sink your client's case, which no lawyer should ever want to do. But you must remember that your witness also created a bad situation for your client, and could have sunk your client's case, especially without your quick remedial action. Your witness deceived the jury and came close to committing provable perjury, which could have destroyed her credibility and dragged her down, as well as you and your client.

> The disclosure of a client's [or indeed, witness's] false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is for the lawyer to cooperate in deceiving the court, thereby subverting the truth-finding process, which the adversary system is designed to implement.[10]

You should have taken remedial action, but preferably in a way that would not harm your client. That is where the difficulty in your case lies. The situation was particularly sensitive as to your relationship with your client because your client, watching the trial, may have been completely unaware of any wrongdoing, and may never have even suspected what you knew – that your witness was feigning a disability.

Remedial action should be as limited as possible while still achieving the goal of remedying the problem without harming your client's interest. Withdrawing from the representation and abandoning your client in the middle of trial was out of the question; it would in effect betray an innocent client, would not remedy the situation and the court would likely have forbidden withdrawal.[11]

Eliciting testimony from your witness about her feigned disability, and then impeaching her on it, was not ideal, as it would likely elicit perjured testimony and if successful would run the great risk of destroying your key witness's credibility as to her entirely honest testimony on the actual subject matter that was up for trial of fact, interfering with the administration of justice by preventing an important witness from usefully describing the battery that she witnessed.

In our view, the best course of action would have been to grab the wheelchair right after she told you of her intention, and to quietly tell her to get out of it. Failing that, once she had wheeled herself to the stand, the best course of action would have been to ask for a side conference with the judge and opposing counsel out of earshot of the jury, to arrive at an arrangement whereby either the witness would be made to leave the wheelchair, or would have to give an honest explanation for it.

We all know that in the heat of the moment, we may not always choose the best course. You did second best, which was quite risky. You did not bring up her wheelchair at all when questioning her, so you did not elicit false testimony. But you took the risk that your opposing counsel would bring it up, mindful of the possibility that your opposing counsel would question her about it, possibly resulting in the roof falling in on you and your client.

On the whole, in matters of ethics and professionalism, it is better to steer away from gray areas and danger zones. Perhaps, should something like this happen again, it would simply be best to ask for a brief adjournment to enable you to think about and chart the best course of action.

Sincerely,
The Forum, by
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QUESTION FOR THE NEXT FORUM

To the Forum,

I have found myself in a strange and amazing predicament. Let me explain. I am an American. I was born and reared in Albany, in the state of New York – anyway, just over the river, in the country. So, I am a Yankee of the Yankees – and practical; yes, and nearly barren of sentiment. My father was a blacksmith, my uncle was a horse doctor, and I was both, at first. Then I went over to Albany and studied law under Amos Dean, and after a few years' practice joined, at the time, the fledging New York State Bar Association in 1876. Although a fine lawyer, I was raised rough, and a man like that is a man that is full of fight – which goes without saying. During an argument conducted with crowbars with a fellow attorney we used to call Hercules, I was laid out with a crusher alongside the head that made everything crack. Then the world went out in darkness, and I didn't feel anything more, and didn't know anything at all – at least for a while.

When I came to again, I was sitting under an oak tree, on the grass, in a most familiar place to me on the corner of Eagle and Pine streets. Not entirely familiar; for although there was the gleaming white marble Court of Appeals right in my line of sight, next door was another building, a courthouse, of which I have never known. There were wheeled carriages of the kind I have never seen, with not a horse or draught animal around, and two very smartly attired officials, both in a dark suit of clothing, each with a shiny badge, a small caliber sidearm neatly holstered, and finely polished black boots.

"Are you OK, buddy?" said the fellow.

"Are you hurt, sir?" added the madam.

Well, after gathering my composure and figuring that these officials were checking on my well-being, I thanked them for their concern and got myself up to figure out what was what.

I made myself across the street to the familiar courthouse and although it was the building I knew, nothing was familiar to me. There were women judges and lawyers, and all of every race. I took the decision to explore what I now knew to be the "new" courthouse next door. I watched a trial and, while familiar in some respects, the lawyers behaved in a most cordial and polite way, with the judge setting them straight if they were otherwise. I heard the judge admonish one and remind him of the Standards of Civility. What are they? I saw lawyers examining a witness with no officer present. And yet, while advocating for their clients, they displayed a fine degree of cordiality and respect for each other. Even so, things did flare, and one reminded the other of the Rules of Professional Conduct. Are there such rules? In another room I saw lawyers debating before a judge through a most peculiar picture frame on her bench. What kind of magic was that!?

By now, I had realized that by some strange action I had been projected into the future. As a member of the highest esteem in the New York State Bar Association, I found my way to our library and found you through the Journal. From the date on the masthead, I, quite perplexed, know that the year 2026 is soon to be here.

Since you seem to be an expert in most things related to law practice, while I work to understand my unique predicament, would you be so kind as to provide me with a brief primer on my observations to help bring me up to speed on our practice over the last 150 years?

Sincerely,
Josiah Perplexatus[12]

Endnotes

1. *See* Vincent J. Syracuse, Amanda M. Leone, and Carl F. Regelmann, *Attorney Professionalism Forum*, N.Y. St. B.J., November/December 2017, Vol. 89, No. 9, pp. 49-51.
2. *See* Rule 1.0(w), defining "tribunal" to include "court."
3. *See* Comment 12 to Rule 3.3.
4. *See* Rule 3.3(a)(1).
5. *See* Rule 3.3(a)(3).
6. *See* Rule 3.4(a)(4).
7. *See* Rule 3.4(a)(5).
8. *See* Comment 8 to Rule 3.3.
9. *See* Comment 2 to Rule 3.3.
10. *See* Comment 11 to Rule 3.3.
11. *See* Rule 1.16(d).
12. With assistance from Mark Twain's "A Connecticut Yankee in King Arthur's Court" (1889).