

### Teaching Notes for Evidence Exercise

**Goals:** This exercise aims to demonstrate the challenges of gathering evidence from remote witnesses who are either incarcerated or long-distance:

- How to capture oral evidence on paper (i.e. how evidence is generally translated into a written format for submission to court)
- Challenges of gathering evidence from a witness
- Increased challenges when the witness cannot communicate directly with the attorney or can only rely on a memory of the evidence

**Duration:** 30-40 minutes (5 minutes explanation, 10 minutes for drawing, then discussion)

**Materials:** Three copies of a simple color photo, paper, colored pencils

**Instructions:** See attached handout

**Discussion:** After the three Attorneys have had an opportunity to reproduce their Witness's "facts," clinic supervisors should hang or post the three reproductions prominently and facilitate a discussion of how each Attorney gathered evidence.

Supervisors can begin by prompting broad observations. What are the biggest differences among the three sketches? Are there any commonalities among what the Observers noted? Did Observers note any particular frustrations over communication? Were any Witnesses or Attorneys surprised by the final reproduction, feeling that they had understood or communicated something entirely different?

In the course of the discussion, supervisors can note that

- Group 1 is what traditional attorney-client communication ideally looks like.
- Group 2 represents experiences working with clients or witnesses who are incarcerated. Often, they will not have access to outside evidence and will rely on memory to communicate facts. How might this affect the accuracy of the evidence? How can attorneys build in room for potential conflicts of evidence? (Noting that the witness does not have access to evidence or is relying on the best of their memory.)
- Group 3 represents experiences of working with clients or witnesses over the phone, as is most common when incarcerated. Here, communication is most difficult because Attorneys cannot read the Witness's body language.

Supervisors should also note that the exercise was 10 minutes long. When Witnesses are incarcerated or long-distance, communication is artificially time-limited, either by actual time limits or expense. Based on what the clinic has taught students about interviewing techniques, how might attorneys have to adapt to these time constraints? (Limited time to build rapport; inability to use classic techniques like asking broad questions and then narrowing in; blocking questions into 'chapters' to address different issues during multiple calls...)

To wrap up the discussion, supervisors should lead students to brainstorm:

1. Possible ways an incarcerated or remote witness would be limited in communicating evidence to their attorney. Ideas might include: Lack of confidentiality, psychological state of client in jail, inability to communicate with body language, inability to gauge the other's understanding, inability to access actual evidence, witness's reliance on memory.
2. Possible ways an attorney would be limited in receiving evidence. These might include: Interrupted interviewing through limited phone call times; scratchy/distant phone calls; inability to read client's body language to understand how an event affected them (do they become glassy-eyed, what emotions does the client's face express, does the client appear to dissociate from an experience?)
3. Techniques to overcome some of these difficulties identified. These might include: establishing rapport with the client by starting slow and building up to your difficult questions; grounding exercises to bring a client back to the present when recounting traumatic memories; engaging in good note-taking so that you build on previous interviews; asking a client to write about their memories; or reviewing information multiple times to see how the story evolves (when the subject is not traumatic)

These lists should be preserved for future reference when issues in attorney-client communication arise (e.g. client is "lying" to the student attorney, surprise evidence, etc.).

### **Exercise: Gathering Evidence from Remote Witnesses**

Divide students into three groups of two, placing them in separate corners of the room (in a large class or if clinic students generally work in pairs, consider having two Interviewers for every Witness in groups of three). Remaining students are Observers and can wander freely among the three groups. In each group, one person will be the Witness and the other will be the Attorney. The Witness's role is to provide the Attorney with facts that the Attorney will use to submit as evidence in a filing. The Witness will have a color copy of the photo, but the Attorney should not see the photo until the exercise is complete.

*In describing the photo, Witnesses should use as much detail as possible, considering spatial relation of objects, color, perspective, size, etc.*

**Group 1:** The Witness will have the photo in front of them and will sit facing the Attorney, at a minimum distance of three feet. The Witness will describe the photo in front of them and the Attorney will attempt to draw it.

**Group 2:** The Witness will again sit facing the Attorney. The Witness will have one minute to consider the photo before turning it over. The Witness will then describe the photo from memory and the Attorney will attempt to draw the photo.

**Group 3:** The Witness will have one minute to consider the photo before turning it over. The Witness will then turn their back to the attorney and describe what they saw as the Attorney attempts to draw the photo.

**Observers** will wander freely throughout the class, seeing the Attorneys' replications develop and noting communication between each Witness and Attorney. Observers are not prohibited from seeing the image being reproduced, but cannot provide guidance to the Witness or Attorney. Observers should note: Are there any particularly helpful questions the Attorney is asking or any helpful phrases the Witness is using? What is the body language of each? Is there any obvious tension or frustration?

