

ETHICS: WALKING THE THIN LINE BETWEEN PREPARING A WITNESS AND COACHING A WITNESS

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Walking the Thin Line Between Preparing a Witness and Coaching a Witness

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The American Bar Association's Model Rules of Professional Conduct prohibit attorneys from telling witnesses what to say, yet they permit and even encourage them to prepare their witnesses for testimony. The thin line between the two areas can be ambiguous. This session will showcase examples of proper preparation and inappropriate coaching to ensure proper conduct.

I. Rules of Professional Conduct That Encourage Witness Preparation

"Witness preparation is any communication between a lawyer and a prospective witness—client or non-client, friendly or hostile—that is intended to improve the substance or presentation of testimony to be offered at a trial or other hearing." John S. Applegate, *Witness Preparation*, 68 Tex. L. Rev. 277, 278–79 (1989). Witness preparation enables lawyers to present witnesses who can testify clearly about their knowledge of the subject matter. *Id.* Almost all American lawyers consider it a fundamental duty of representation and a basic element of effective advocacy to prepare witnesses to testify. *Id.*

The Preamble to the Model Rules of Professional Conduct recognizes the many roles of a lawyer, including the roles of advisor and advocate. "As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications." See Model Rules of Professional Conduct, Preamble para. 2. "As advocate, a lawyer zealously asserts the client's position under the rules of

the adversary system." *Id.* A lawyer serves in both of these roles when preparing a client for deposition and is always serving as an advocate when preparing any witness for deposition.

Model Rule of Professional Conduct 1.1 (Competence) provides that "a lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." (Emphasis added.) "Competent handling of a particular matter includes ... adequate preparation," which is determined in part by the complexity and consequence of what is at stake. See Model Rule of Professional Conduct 1.1., Comment 5. In order to provide competent representation, a lawyer must prepare witnesses to give testimony.

Model Rule of Professional Conduct 1.2 (d) (Scope of Representation and Allocation of Authority Between Client and Lawyer) permits a lawyer to discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law. A lawyer may give an honest opinion about the actual consequences that appear likely to result from a client's conduct. See Model Rule of Professional Conduct 1.2 (d), Comment 9. This Rule allows an attorney to explain the implications of the manner of presentation of the testimony to the witness.

Model Rule of Professional Conduct 1.3 (Diligence) requires a lawyer to be a diligent and zealous advocate for his client. "A lawyer should pursue a matter on behalf of a client... and take whatever lawful and ethical measures

are required to vindicate a client's cause or endeavor." Model Rule of Professional Conduct 1.3, Comment 1. Witness preparation is one of those lawful and ethical measures.

Model Rule of Professional Conduct 1.6(a) (Confidentiality of Information) protects the information exchanged between a lawyer and client by prohibiting a lawyer from revealing information relating to the representation of a client with a few distinct exceptions. The principle of Rule 1.6(a) has become effective through the attorney-client privilege and the work product doctrine. These privileges and doctrines typically protect witness preparation from discovery. See *Upjohn Co. v. United States*, 449 U.S. 383; see also *Hickman v. Taylor*, 329 U.S. 495 (1945).

Courts have upheld the confidentiality of witness preparation. See *Giordani v. Hoffmann*, 278 F. Supp. 886, 892 (E.D. Pa. 1968) ("fail[ing] to see how information regarding the actions which transpired in preparing for a deposition have any relationship to the merits"); *Bercow v. Kidder, Peabody & Co.*, 39 F.R.D. 357, 358 (S.D.N.Y. 1965) (refusing to require witness to answer questions concerning the people with whom he had met and the documents he had reviewed in preparation for a deposition); *Phoenix Nat'l Corp. v. Bowater United Kingdom Paper Ltd.*, 98 F.R.D. 669, 671 (N.D. Ga. 1983) (noting that "insofar as defendant's question attempted to elicit from the witness specific questions that plaintiff's counsel posed to him, . . . it exceeds the permissible bounds of discovery"); *Ceco Steel Prods. Corp. v. H.K. Porter Co.*, 31 F.R.D. 142, 144 (N.D. Ill. 1962) (asserting that "the information which defendants here seek should be readily available direct from the witnesses for the asking and not through disclosure of conversations with counsel held for purposes of discovery and trial preparation").

While the Rules and court decisions do not provide specific "do's and don'ts" for witness preparation, The Restatement (Third) of the Law Governing Lawyers §116, Interviewing and Preparing a Prospective Witness, Comment b, provides a roadmap for the ethical preparation of a witness.

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of

law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer may not assist the witness to testify falsely as to a material fact.

Restatement (Third) of the Law Governing Lawyers § 116, Comment b (2000).

II. Rules of Professional Conduct That Forbid Witness Coaching

"[A lawyer's] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know." In re *Eldridge*, 82 N.Y. 161, 171 (1880).

While Model Rule of Professional Conduct 1.2(d) permits a lawyer to discuss the legal consequences of particular conduct with the client, it prohibits a lawyer from "counsel[ing] a client to engage, or assist[ing] a client, in conduct that the lawyer knows is criminal or fraudulent." The Rule commentators note there is "a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity." See, Model Rule of Professional Conduct 1.2, Comment 9. The latter is prohibited.

Model Rule of Professional Conduct 3.3(a)(3) (Candor Toward the Tribunal) requires that a lawyer not knowingly "offer evidence that the lawyer knows to be false." This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal and applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition (Emphasis added). See Model Rule of Professional Conduct 3.3, Comment 1. Model Rule of Professional Conduct 3.3(a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false. See, Model Rule of Professional Conduct 1.2 (d), Comment 1. The remedial measures should begin with the lawyer remonstrating with the client confidentially, advising the client of the lawyer's duty of candor to the tribunal and seeking the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. However, if such measures fail, the lawyer may need to withdraw from the representation or must make

a disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6.

Model Rule of Professional Conduct 3.4(b) (Fairness to Opposing Party and Counsel) states that a lawyer must not “counsel or assist a witness to testify falsely.” Fair competition in the adversary system is secured by prohibitions against... improperly influencing witnesses.” Model Rule of Professional Conduct 3.4(b), Comment 1.

Model Rule of Professional Conduct 8.4(c) provides, “It is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Further, according to Model Rule of Professional Conduct 1.4 (a), “A lawyer shall consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.” This means that if a client intends to testify falsely or seeks advice to testify in a way that distorts or misrepresents the truth, the lawyer must communicate to the client that he is unable to engage in such conduct.

Additionally, Model Rule of Professional Conduct 5.3(c) (1) provides that “[w]ith respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders, or, with the knowledge of the specific conduct, ratifies the conduct involved.” This means attorneys must carefully oversee any non-attorneys involved in witness preparation.

In *Ibarra v. Baker*, 338 F. App’x 457 (5th Cir., 2009), the Fifth Circuit held that two attorneys committed misconduct when they improperly coached witnesses. In *Ibarra*, the attorneys were representing the county and some of its law enforcement officers in a civil action filed after the conclusion of the criminal trial. The attorneys retained a consultant who prepared a report, and sent the consultant to meet with law enforcement officer witnesses prior to their depositions. During the meeting, the consultant provided a copy of his trial transcript and had some discussions with the witnesses about certain “terms of art” pertinent to the defense theory. These officers had already given trial testimony in the criminal case. Following the meetings with the consultant, at their depositions, the officer witnesses showed up with notes that closely tracked the consultant’s report and testified in conformity with the consultant’s theories.

III. The Gray Area Between Preparing a Witness and Coaching a Witness

In considering how far lawyers may go in suggesting appropriate language for witness testimony, the D.C. Bar Legal Ethics Committee has noted that a lawyer may not prepare, or assist in preparing, testimony that he or she knows, or ought to know, is false or misleading. See D.C. Bar Formal Op. 234 citing D.C. Bar Formal Op. 79 (1979). However, a lawyer may properly suggest language as well as the substance of testimony and should do whatever is feasible to prepare his or her witnesses for examination. *Id.*

The classic book and movie, “Anatomy of a Murder,” provides one example of walking the tightrope between preparation and coaching. At the outset of an accused murderer’s first meeting with his attorney, the lawyer gives his client “The Lecture” to inform him that the state recognizes only four legal defenses to murder, and he describes each of the them, knowing that he already believed temporary insanity to be the best defense for his client. Based on “The Lecture,” the client concluded that he should plead temporary insanity, one of the four possibilities and indeed the one that becomes the successful defense.

In the classic legal drama, “The Verdict,” the defendant anesthesiologist who allegedly committed medical malpractice initially responded to his lawyers’ practice questions in a cold, detached, and clinical manner. However, with preparation from the lawyers, at trial he displayed more warmth and emotion and used his attorneys’ words to describe events.

A real-life example involves the inadvertent discovery of a memo written by lawyers for class claimants in an asbestos litigation. In 1997, during a deposition, a 20-page memo from the firm Baron & Budd to asbestos clients entitled “Preparing for Your Deposition” was turned over to defense counsel by a young associate. The memo provided detailed information about asbestos products, set forth a list of health symptoms that may enhance damages, anticipated potential questions, and advised the clients of what they should not or “never” say.

Other common examples in civil litigation cases include informing witnesses of contradictory information from documents and testimony, or statements from another party’s Answers to Interrogatories to determine how to reconcile inconsistencies.

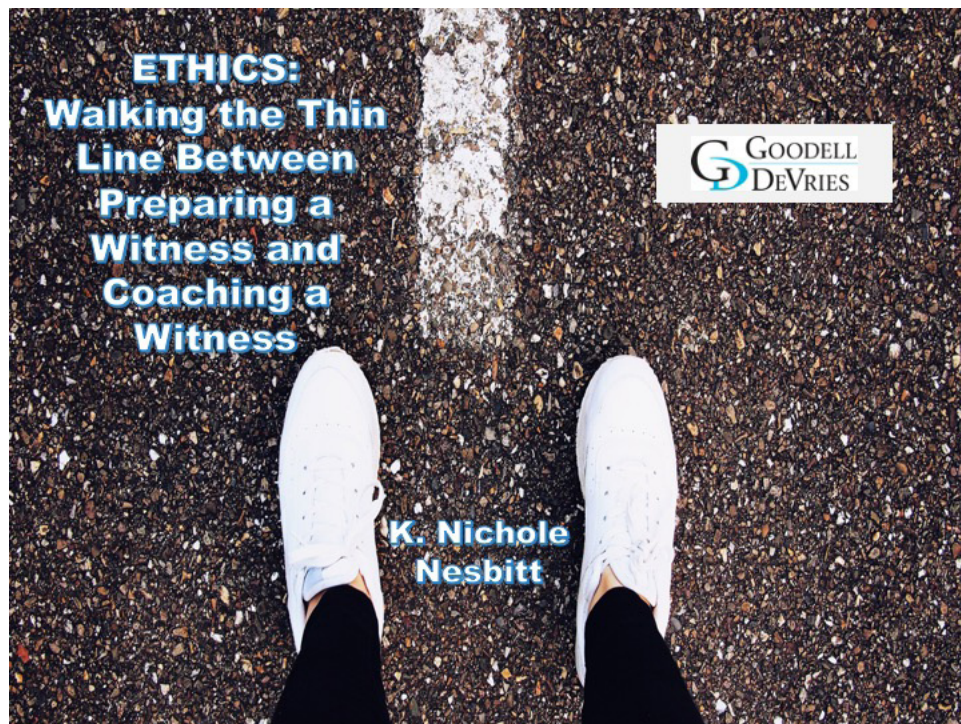
IV. Conclusion

“An attorney enjoys extensive leeway in preparing a

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witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.” See generally John S. Applegate, *Witness Preparation*, 68 Tex. L.Rev. 277 (1989). As lawyers, we must prepare witnesses for deposition to properly represent our clients, but we must be careful that our preparation does not lead to the

falsification, distortion or suppression of the substance of the witness’s testimony. Although often a gray area, a key consideration is whether the preparation has merely changed the style or presentation of the witness’s truthful testimony or whether it has changed the substance of the testimony.





**Not just permissible.
As to clients, it's our ethical
obligation.**

ABA Rules of Professional Conduct

- ▶ 1.1 Competence
- ▶ 1.2 (d) Scope of Representation and Allocation of Authority Between Client and Lawyer
- ▶ 1.3 Diligence
- ▶ 1.6 (a) Confidentiality of Information

Model Rule of Professional Conduct 1.1 (Competence)

- ▶ “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, **thoroughness and preparation** reasonably necessary for the representation.”

Model Rule of Professional Conduct 1.3 (Diligence)

- ▶ “A lawyer shall act with reasonable diligence and promptness in representing a client.”

Model Rule of Professional Conduct 1.2 (d) (Scope of Representation and Allocation of Authority Between Client and Lawyer)

- ▶ “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”

Model Rule of Professional Conduct 1.6 (a) (Confidentiality of Information)

- ▶ “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”

Witness Preparation - The Basics

- ▶ What to expect
- ▶ How to behave
- ▶ How to present answers

Witness Preparation



- ▶ What it means to be under oath / importance of telling truth
- ▶ Mannerisms and attitude
- ▶ Non case-specific “Rules”
 - ▶ Don’t lie
 - ▶ Don’t guess
 - ▶ Don’t rush
 - ▶ Answer only the question
 - ▶ Etc.

Witness Preparation



And in general avoiding looking like this:



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Witness Coaching

Considered to be ethically improper

ABA Rules of Professional Conduct

- ▶ 1.2(d) Scope of Representation and Allocation of Authority
- ▶ 1.4(a)(5) Communications
- ▶ 3.3(a)(3) Candor Toward the Tribunal
- ▶ 3.4(b) Fairness to Opposing Party and Counsel
- ▶ 8.4(c) Misconduct
- ▶ 5.3(c) Responsibilities Regarding Nonlawyer Assistance

Model Rule of Professional Conduct 1.2 (d)
(Scope of Representation and Allocation of
Authority Between Client and Lawyer)

- ▶ **“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.”**

Model Rule of Professional
Conduct 3.3 (a)(3)
(Candor Toward the Tribunal)

- ▶ **“A lawyer shall not knowingly offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”**

Model Rule of Professional Conduct 3.4 (b) (Fairness to Opposing Party and Counsel)

- ▶ “A lawyer **shall not falsify evidence**, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.”

Model Rule of Professional Conduct 1.4(a)(5) (Communications)

- ▶ “A lawyer shall consult with the client about any relevant limitation on the lawyer’s conduct **when the lawyer knows that the client expects assistance not permitted** by the Rules of Professional Conduct or other law.”

Model Rule of Professional Conduct 5.3 (c) (Responsibilities Regarding Nonlawyer Assistance)

- ▶ A lawyer shall be responsible for misconduct of a retained or employed nonlawyer if the lawyer orders or ratifies it.

Witness Coaching



- ▶ Encouraging perjury
- ▶ Encouraging misrepresentation of facts, data or statistics
- ▶ Encourage omitting truthful testimony

Witness Coaching



“[The lawyer’s] duty is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know.”

In re Eldridge, 82 N.Y. 161, 171 (1880)

Current (pending) example

- ▶ Pending in U.S. District Court for the District of Maryland
- ▶ Allegation: Health care and pharmaceutical companies conducted improper experiments on unknowing Latino patients
- ▶ Discovery showed patients were asked to sign untranslated affidavits they did not understand, which contained falsehoods
- ▶ Plaintiffs’ experts signed reports containing data unsupported by lab tests
- ▶ Counsel’s defense: Falsehoods were inadvertent, in part due to language barrier
- ▶ Motion for sanctions pending

Model Rule of Professional Conduct 8.4 (c) (Misconduct)

- ▶ “It is professional misconduct for a lawyer to engage in conduct involving **dishonesty, fraud, deceit or misrepresentation.**”

Consequences of Witness Coaching

- ▶ **EFFECT ON YOU**
 - ▶ Disciplinary action (including potential disbarment)
 - ▶ Sanctions by the Court
 - ▶ Criminal charges
- ▶ **EFFECT ON YOUR CLIENT**
 - ▶ Exclusion of witness and/or evidence
 - ▶ Possible mistrial (depending when coaching is discovered)
- ▶ **EFFECT ON THE WITNESS**
 - ▶ Perjury charges



Tough Calls

Tough Calls

- ▶ Explaining the consequences of testimony
- ▶ Educating corporate designees
- ▶ Explaining legal theories to experts

How far can you go?



Guidance from the Bench

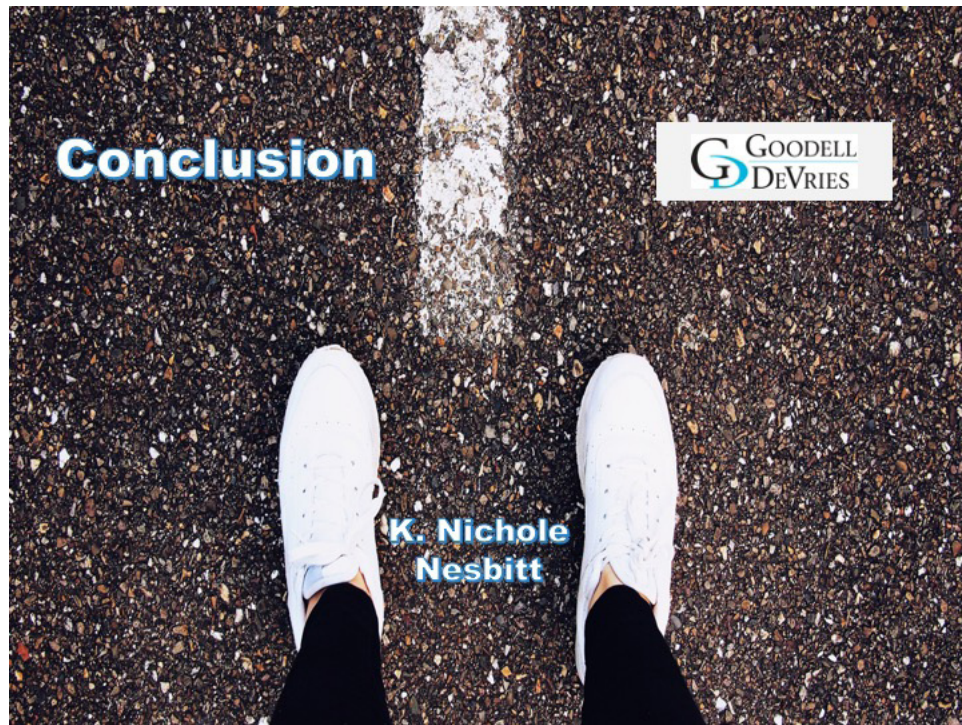
- ▶ *Ibarra v. Baker*, 338 F. App'x 457 (5th Cir., 2009)
 - ▶ “An attorney enjoys extensive leeway in preparing a witness to testify truthfully, but the attorney crosses a line when she influences the witness to alter testimony in a false or misleading way.”
- ▶ *Resolution Trust Corp. v. Bright*, 6 F.3d 336 (5th Cir. 1993).
 - ▶ Attorneys who tried to convince witness to sign an affidavit containing facts the attorneys believed were true were advocating for their client and did not commit attorney misconduct.

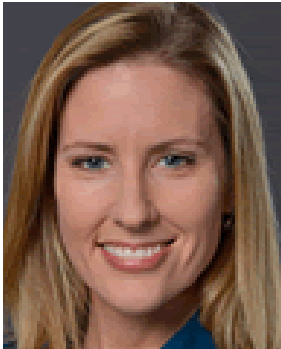
DOs

- ▶ Tell witness: “The most important rule is to tell the truth.”
- ▶ Educate the witness on the relevant legal issues
- ▶ Discuss the witness’s recollection or knowledge
- ▶ Review pertinent documents and evidence
- ▶ Rehearse potential questions
- ▶ Give advice on non-verbal issues

DO NOTs

- ▶ Instruct the witness to lie or make up testimony
- ▶ Instruct the witness to conceal facts
- ▶ Instruct the witness to misrepresent facts, data or statistics





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Ms. Nesbitt is a partner with the firm. Her current practice concentrates on medical malpractice defense and complex commercial litigation, as well as cases that combine the two fields. She represents several health systems in Maryland and the District of Columbia, handling complicated malpractice cases as well as credentialing, employment, and compliance-related matters. Ms. Nesbitt also handles employment matters outside of the healthcare context for employers in this region and beyond. Ms. Nesbitt's experience as a litigator provides her with insight to counsel her employment clients on drafting guidelines, policies, and agreements, in addition to defending matters that have already proceeded to litigation.

For the entirety of her 18 years at the bar, Ms. Nesbitt has worked for Goodell DeVries and has moved through the ranks from summer associate to partner. Likewise, she has enjoyed positions of leadership in the Maryland Defense Counsel, the Defense Research Institute, and in non-legal organizations such as JDRF.

Practice Areas

- Commercial and Business Tort Litigation
- Employment Litigation
- Medical Malpractice
- Medical Institutions Law
- Professional Liability
- Hospitality Law

Representative Matters

- *Wilds v. MedStar Washington Hospital Center* (2018), Superior Court for the District of Columbia. Obtained defense verdict for hospital and its special police officers in connection with an excessive force claim brought by a visitor. The plaintiff claimed she was wrongfully taken to the ground and handcuffed following an altercation with two special police officers, resulting in injury to her shoulders. The jury returned a verdict in favor of the hospital and the officers after a four-day trial.
- *Wood v. MedStar Harbor Hospital* (2017), Circuit Court for Baltimore City. Obtained defense verdict for physician accused of injuring another physician in the course of performing surgery on a patient. The plaintiff, an orthopedic surgeon, accused the defendant, also an orthopedic surgeon, of negligently striking him in the elbow with a drill while both surgeons were performing a knee replacement. The plaintiff claimed the injury was career-ending. After an eight-day trial, the jury returned with a verdict in favor of Ms. Nesbitt's client.

Honors and Awards

- Best Lawyers in America- Commercial Litigation (2016, 2018)
- Chambers- Healthcare, Maryland (2017)
- Leading Women Award from The Daily Record (2011)
- Super Lawyers Rising Stars (2009-2014)

Education

- University of Maryland - (B.A., cum laude, 1996)
- University of Maryland, School of Law - (J.D., 1999); Order of the Coif

