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Young Lawyer's Corner

Four Critical Tips for Taking Your First Witness at Trial

By David Grenardo



David Grenardo

Opportunities to take a witness at trial can be few and far between for an attorney who is just starting out practicing law. Over 90 percent of all cases settle, and clients often demand that more senior attorneys try high-value cases. As a result, junior attorneys may find that opportunities to examine a witness at trial do not come as soon or as often as they want. In this competitive environment, a junior attorney must seek out the trial opportunities, make the senior attorneys on their cases aware of their desire to take a witness, and be prepared to do an excellent job when the opportunity arises. This article provides four crucial tips for a junior attorney who is examining his or her first witness at trial.

1 Know the Rules

You must know the rules before you can play the game. All those days in evidence class in law school may not come back to you immediately when you begin preparing to take a witness, so review and study evidentiary rules, proper objections, and hearsay exceptions. You must know the rules of evidence to determine what types of evidence and questions are acceptable. You must know what objections there are so that you can avoid them during your own line of questioning and so you can object when opposing counsel is questioning the witness for which you are responsible.

You must also be fully versed in the procedural rules governing your trial. For instance, in California, cross-

examination is limited to the material covered by a witness on direct examination, while in Texas, cross-examination is wide open to any topic relevant to the lawsuit. In arbitration or an administrative trial, the rules and procedure are more flexible, so you are not as limited as in some other jurisdictions, such as California. In any event, you must understand what the rules are to develop and execute your questioning and to properly object during opposing counsel's questioning.

2 Focus on the Fundamentals

There are basic rules to questioning a witness at trial, and a junior attorney can make his or her questioning more effective and avoid major missteps by simply adhering to these rules. When you are cross-examining a witness, always ask leading questions that require a yes or no answer, never ask a question you do not know the answer to, and stay in the record, i.e., use depositions, declarations, and interrogatory responses as the basis for your questions so you always have something to impeach your witness if he or she answers inconsistently from prior testimony. Some junior attorneys get flustered when their plan to trip up the witness goes astray as they are trying something new, or they slip up and ask a non-leading question that gives the witness an opportunity to tell his or her story again, as the witness did on direct examination. Remember, on cross-examination, you are telling the story and you control the witness so long as you stay in the record and properly impeach when the witness strays from the evidence.

On direct examination, ask open-ended questions and let the witness tell the story. Open-ended questions start

with "who," "what," "when," "where," "why," and "how." Questions that begin with "please describe" or "please explain" can also be appropriate provided the question asks for a specific item, such as "Please describe the condition of the car in the accident the day you bought it." Also, use responses that the witness gives you instead of asking less-effective questions, such as "What happened next?" For example, if a witness gives you a great answer (e.g., "I was shocked when I read that June 5 email and learned that the director stole the company's own money"), you can ask the witness "After learning that the director stole the company's money, what did you do?" as opposed to "What happened next?" Stick with the basics of questioning at trial, and your examination will likely go more smoothly.

3 Be Organized

Understand the case and know what testimony you need to get out of a witness on direct examination and what points and arguments you want to make on cross-examination. A good rule to follow is to set up modules or areas of testimony by topics, which include all of the questions that you want to ask on a certain topic. For example, if you want to cover damages, intent, and causation, then divide up those topics and have thoughtful questions arranged in a logical manner in each area. In some instances, you may not need to go into a certain module or area with a witness depending on how his or her testimony went on direct or what other witnesses testify to at trial. But be prepared for everything.

Speaking of which, being organized also means being prepared. During preparation of the witness for direct,

make sure you and the witness know the essential facts that you need to address in his or her testimony. That way, when the witness fails to include something in his or her answer, you can provide a prompt that does not sound rehearsed. For example, in preparation prior to trial, the witness remembered that when the crash occurred, the light was green, it was raining, and he was stopped at the crosswalk on Fifth and Main. You want the witness to testify about all of those things, but he only testifies about the color of the light and where he was. You can prompt the witness by asking, "How was the weather?" Sometimes a junior attorney will simply ask "What else do you remember?" These questions may not trigger the response you are seeking and will give no real help to a witness who may be struggling.

Also, never tell your witnesses to memorize any answers. This may result in the witnesses looking up into the air or delaying answering a question because they are trying to remember what they memorized or what they think you want them to say. Make sure to let the witness know what's important in trial preparation. It's your job to prompt the witness to elicit that testimony in a non-leading manner. You want the witness to sound prepared—not rehearsed.

Make your cross-examination as concise as possible. Although some examinations can go much longer (depending on the witness), sometimes an effective cross need only be a few questions. In any event, the trier of fact (judge or jury) will appreciate you making your points and not prolonging the process. In addition, a sharper cross will help keep you and the witness in a rhythm.

Regardless of whether you are on cross or direct, have the exhibits you plan to use ready and available in the best media that the courtroom or conference has—digital screens, overhead projector, or easel. Have exhibits for the witness, the court, and the judge, as well as the jury.

Something unexpected always happens at trial, whether a witness says or does something unexpected or the technology you plan to use doesn't function as you anticipated. Being organized, and thus prepared, allows you to deal with those surprises much easier.

4 Be Mindful of the Trier of Fact Think about the trier of fact in everything you do. For example, position yourself and the witnesses in places that allow the trier of fact to feel the full effect of what you are trying to do. For example, if you are conducting a direct examination, you may want to position yourself

right next to the jury so the witness is speaking in the jury's direction and making eye contact and a connection with them when the witness is testifying. If you are conducting a cross-examination, put yourself in the well or center of the courtroom, as you are now testifying through your questions, and you want the jurors' or judge's eyes on you.

Also, understand that if you are trying the case to a judge alone, you may not need the same emotion as you do with a jury. Nevertheless, with a judge or a jury, make sure that you keep them engaged and connect all the dots for them, allowing them to follow what you are arguing and saying by keeping the language and themes simple, yet interesting, throughout your case.

Relentlessly search out the opportunity to take a witness at trial. When that opportunity arises, follow the simple tips above to make sure you do your best at trial and to help ensure that the senior attorney and client think of you first when they need someone to take a witness at the next trial. ■

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