
BARRISTER'S TIPS

By Yujin Chun

A witness can make or break a case. A good lawyer's skills will be evident not only in his or her questioning of the witness but also in how that lawyer's witness performs on the stand. Often, before a junior lawyer has the opportunity to take trial testimony, he or she will be tasked with preparing or helping to prepare witnesses. There are several considerations to keep in mind while performing this important task.

Instead of a specifically worded script of questions, the handling attorney should prepare an outline of topics focused on the points that need to be established in the direct testimony. While practicing the examination, the attorney should ask the same question in different ways to better prepare the witness. The witness and attorney also should run through the entire examination multiple times, from swearing in to the final question. The witness should be informed of when to expect objections and to let the attorney handle the objections instead of the witness's reacting to them.

If using demonstratives, the attorney and witness should practice both with the demonstratives present as well as without them in case there are technical difficulties (such as may happen in video or remote testimony) or sustained objections resulting in being unable to use the demonstratives. For expert witnesses who create their own demonstratives, the attorney and witness should review the demonstratives several times to ensure that everything is accurate and as produced to the other side in discovery.

Practice Sessions

To practice cross-examination, the attorney should try out different styles, running through the entire examination several times. Each practice session should involve questions asked in different ways to help prepare for whatever style the opposing side adopts. If possible, another lawyer should conduct at least one practice run of the cross-examination while the examining attorney raises objections as he or she would do at trial. During practice, the witness should experience the

"worst case scenario" of an aggressive cross-examination, which also includes completely irrelevant questions. The goal is to genuinely throw off the witness for the first time prior to the actual testimony so the handling attorney can prepare for how that witness responds in those situations and advise on what to do. The witness should understand that the cross-examination will be different from a deposition, and that there will be demands for concise "yes" and "no" answers. There may be gaslighting tactics that the witness should prepare for as well. Finally, the witness should know that there will be an opportunity to provide context for certain answers on redirect.

While practice is important, the witness should not be over-rehearsed. When things seem to flow almost on "auto-pilot," the witness runs the risk of becoming rattled when there is a long discussion on a particular objection or if the judge orders that an entire line of questioning be dropped. Such a witness would immediately lose credibility with

the jury, as would the over-rehearsed witness who stops paying close attention to each question and accidentally gives the wrong response. If possible, the attorney should video-record practice sessions so the witness can see how he or she comes across in response to the questions.

Throughout the entire preparation period, communication is key. For those who have never been a witness before, it is especially important to provide as much information as possible and make him or her comfortable with asking questions about the process. The lawyer needs to understand what the witness is comfortable with and what apprehensions, if any, the witness has.

Depending on the experience level of the witness as well as the witness's familiarity with the case, it may be beneficial to explain what the attorneys are trying to accomplish with his or her testimony on both sides. On the other hand, some witnesses may start to change their testimony in an attempt to "help," thus characterizing facts to fit what they believe would be beneficial for the case.

This can be detrimental, and often is incurable. Above all, the witness should be informed of the utmost importance of telling the truth under oath.

Unexpected Situations

The lawyer should share with the witness various unexpected situations that can arise, e.g., what to do if the witness forgets a factual detail or an instruction, what to do when there is an objection (from either the opposing counsel during direct or from the lawyer during cross), whatever insight there is about the opposing counsel and the judge, and more. However, the lawyer should pay close attention to discovery and disclosure rules when doing so, as these communications may be compelled in some circumstances.

Some witnesses will need guidance regarding posture, dress, pace, and more. The witness should understand who will be in the room: the judge or other neutral; the jury, if it is a jury trial; the attorneys; court reporters; bailiffs; and those who may be per-

mitted to spectate. To the extent possible, the lawyer should attempt to minimize the number of possible surprises for the witness on the day of testimony.

Finally, the lawyer should ensure that his or her witness is clear on the logistics for the day of testimony, for example, where to go, how to get there, and what to do before and after the testimony. The lawyer should have multiple lines of open communication available so the witness can reach out with last-minute questions. Preparing a witness for trial testimony can be a daunting task for a junior lawyer, but with sufficient planning and care it can be an enjoyable and rewarding experience. ■

Yujin Chun is a senior associate in the trial and litigation practice group at the Los Angeles office of Meyers Nave. She also is a member of the executive committee of the LACBA Barristers/Young Attorneys Section.