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Top 10 Dos and Don'ts To Tell Your Clients Before They Take the Witness Stand

As important as the evidence and facts are to a case, so is credible witness testimony. Without clear and confident witnesses, a trial's outcome may be less than what an attorney has worked so hard to achieve. Here are 10 key dos and don'ts to tell witnesses so they testify credibly and persuasively in court.

1. Tell the truth, no matter how painful, scary, or awkward it may be. I can deal with anything, as long as it is your truth.

Witnesses are often — understandably — afraid to tell the truth, afraid of how it may appear, and afraid of the consequences. Explain to your client the importance of answering truthfully when you prepare him or her for testimony, and the equal importance of continuing to answer truthfully when testifying.

2. Listen carefully to the question, and answer only what is asked.

Witnesses are often so eager to answer, they only half-listen to the question, and therefore answer poorly.

Careful listening is the first line of defense in deposition or trial. Witnesses must take time to fully listen and understand the question and not rush to answer.

3. When you do not fully understand the question asked, do not attempt to answer, but rather politely request a rephrasing of the question.

For a whole host of reasons — not to appear dumb or ill-informed, out of nervousness or impatience — witnesses try to answer questions that are not clear to them. If a witness is confused or unsure about a question, it is almost certain the witness will answer poorly and ineffectively.

The easiest and most effective way for a witness to obtain clarification about a question is to say simply, "I don't understand the question." It may take some courage on the part of witnesses to do so, but remind them that not all attorneys ask good questions.

4. Don't respond to a question before thinking it through and organizing the answer in your mind.

In ordinary day-to-day conversation, we often think "out loud." In a deposition or trial, however, thinking out loud can cause all sorts of problems. For example, the lawyer asks: "What happened on the 4th of June at 4:00 p.m.?"

The witness (thinking aloud) replies: "Let's see, on June 4th I was in a meeting with our accountant all morning. Then, that's right, we've had this ongoing situation with employee Brown and I think I was dealing with that until, well lunch time at least. Then, uh, I think I reviewed some budget requests, and at 4:00 p.m., I facilitated a meeting with Ms. Smith and Ms. Jones."

BY DR. NOELLE NELSON

Because the witness was thinking aloud, he gave opposing counsel information that could damage the case, namely, that there was a situation regarding employee Brown and some budget issues. This is all the witness needed to say: "On June 4th at 4:00 p.m., I facilitated a meeting with Ms. Smith and Ms. Jones." Encourage witnesses to be specific and succinct.

5. Collect your thoughts by pausing before you answer.

Witnesses are often reluctant to take time to think before speaking because they are afraid it will take too long, and that jurors will assume the witness is hedging or lying. That is rarely true.

Pausing a moment or two before answering is especially important during cross-examination. The pause enables witnesses to think carefully when opposing counsel asks questions thick and fast. Their answers will be far more coherent, to the point, and effective. The pause allows jurors to absorb the question and get mentally ready for the answer. Point out to your witness that the pause also gives you the opportunity to object if necessary. The pause is one of the single most important tools a witness can use during testimony.

6. Basic questions ask for what, where, how, when, who, and why. Answer each question accordingly.

Jurors are primed by attorney questions for certain answers. The question, for example, "When did you first meet Mr. Smith?" gets jurors ready for a date or time. When the witness responds, instead, that "Mr. Smith was no concern of mine; I was just taking care of ..." the witness throws jurors off their expected track. A witness who persists with non-responsive answers irritates jurors. If a witness continues in this mode, he or she will eventually appear evasive. Jurors are willing to forgive a few non-responsive answers, but only a few.

7. When necessary, use a brief qualifying phrase before your yes or no responses.

It is easy to get frustrated during cross-examination when opposing counsel is doing everything to block a witness from responding with anything but an affirmative answer. Cross-examinations are often filled with a litany of "Isn't it true that ..." or "Wouldn't you

agree that ..." questions. Your witness can respond to this type of questioning by using phrases such as, "In this situation, yes;" "Under certain circumstances, no;" "At the time, yes;" and "Not as I understand it, no." The key is to keep the qualifying phrase sufficiently brief so as not to appear evasive, and still say "yes" or "no" after the qualifier so as not to be non-responsive.

Your witnesses' use of qualifying phrases prevents them from being defensive or unwittingly agreeing with opposing counsel as they are led down the merry path to misrepresenting their experience entirely.

8. Don't forget to make eye contact. When eye contact is made properly, you establish terrific credibility with the jurors. When eye contact is not made properly, it can unfortunately have the opposite effect.

Eye contact matters greatly in court. Witnesses must look at the attorney addressing them. If the response to the question is short, they should keep their eyes on the questioner. For example, the attorney asks, "When were you first hired by X Company?" and the response is, "in May of 2005." In this case, the eyes of the witness remain on the attorney. However, when the response is longer, the witness should look at the attorney for the first few words of the response, then turn towards jurors and look at them while providing the body of the answer. The witness should conclude by turning back to the attorney when finishing the response. This rhythm comes with practice, and the resulting movements will look and feel natural. Practice is essential.

Witnesses should be reminded to avoid looking at you when being cross-examined. Witnesses looking at their attorney during cross-examination send a lethal message to the jurors: "I don't know what I'm doing. Is this right?" Jurors will generally assume the witness has been coached to the nth degree and is probably lying. When on the stand, the witness should look either at the lawyer asking the questions or at the jury — nowhere else. The exception is if the judge asks the witness a question, in which case the witness should immediately direct full attention to the bench.

9. Dress simply and conservatively.

Witnesses must avoid flashy or overly stylish outfits. Jewelry and other

accessories should be kept to a minimum. Hair styles and makeup should be understated, not overstated. Witnesses' testimony should be more interesting than what they are wearing. Clothes should be clean and pressed, shoes shined and hair neat.

If depositions are videotaped, which is common these days, counsel witnesses to wear "camera friendly colors" such as blue, tan, gray, or other subdued tones. They should avoid bold patterns, including large plaids or floral designs.

10. Think of testimony as if your goal is to share information.

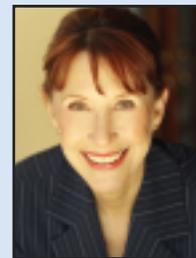
Witnesses may be angry, frustrated, depressed, or fearful regarding the matter about which they are testifying. This is perfectly natural. However, an aggressive, angry, or sarcastic tone will never find favor with jurors. The best possible attitude is for witnesses to think of themselves as educating the jurors to their point of view.

When witnesses come from a place of sharing information, they present themselves as reasonable, thoughtful individuals — ones who will find favor with the jurors.

Most witnesses have never set foot in court or had to testify. While just another day at the office to the attorney, a trial is often a new, frightening, and uncomfortable experience to the lay witness. Simple witness preparation can go a long way to make their trial experience a success. ■

About the Author

Noelle C. Nelson, Ph.D., is a California-based trial consultant who provides trial/jury strategy, witness preparation, and focus groups for attorneys. She is the author of *A Winning Case* (Prentice Hall) and *Connecting With Your Client* (American Bar Association). She is also the author of the booklet *101 Winning Tips: How to Testify Credibly and Persuasively in Court*.



Dr. Noelle C. Nelson

30765 Pacific Coast Hwy., #132
Malibu, CA 90265

E-MAIL nnelson@dr.noellenelson.com

WEB SITE www.dr.noellenelson.com