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IN THIS ISSUE

Sandy Wunderlich provides practical, real-world advice on how to help your witnesses maintain their composure or get things back on track while testifying.

Strategies to Help Your Witness Maintain or Regain Control During Their Testimony

ABOUT THE AUTHOR



Sandra Wunderlich is a partner in the St. Louis office of Tucker Ellis LLP. She has a diverse litigation background, with a particular emphasis on intellectual property consulting and litigation. An experienced trial lawyer, Sandy has been lead trial counsel in more than a dozen jury and bench trials. Over the past 25 years, she has litigated intellectual property matters from the cease-and-desist stage through appeal. Sandy has also represented large pharmaceutical manufacturers, agricultural and industrial manufacturers, a Fortune 50 company, and large national banks and credit arms of Fortune 100 companies in complex litigation matters. She is the incoming chair of DRI's Women in the Law Committee, and actively speaks and writes for organizations including IADC, DRI, IPO, and INTA. She can be reached at Sandra.Wunderlich@tuckerellis.com.

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Introduction

Witnesses are the backbone of every trial—the words they speak are the evidence upon which the jury must rely to decide the case, and the way the witness delivers those words determines whether they are to be believed. A trial is a stressful situation, and even the best of witnesses can lose their way, become confused, forgetful, or even combative on the stand. It can be a challenge to get the witness back on track and calm their demeanor while they are still on the witness stand. This article addresses strategies a lawyer can employ to help the witness maintain, and if necessary, regain control.

Pre-testimony Planning and Preparation

Talk about strategies for when things go awry. Before the witness takes the stand, the lawyer should have a heart to heart discussion about the potential impact of nerves on their testimony. If you don't prepare your witness for the possibility of emotional strain impacting their testimony, they won't know how to regain their composure when the time comes. Just talking about the fact that anxiety may have an impact can be reassuring to the witness when it strikes. It assures them that it is normal to be nervous. It leads to a candid conversation about what to do, and what not to do.

Exercise Self-care. Remind your witness to get a good night of sleep and use their own techniques for seeking calm before they testify. A good night of sleep can provide the witness with clarity like nothing else. Have a cut-off point in the preparation so that the witness has a break in between and can find their own center. You can over-prepare a witness so that they do not come across as authentic, and worse, they rely upon the practiced answers rather than their own ability to field the questions, which can lead to a lack of confidence and mistakes. Encourage the witness to take a break between the last preparation session and their testimony to do something they enjoy so they are refreshed and ready for the challenge.

Encourage the witness not to be so hard on themselves. You cannot always predict what opposing counsel will ask. Encourage the witness not to panic if opposing counsel asks questions that did not come up during the practice sessions. If they are asked a question and they are unsure how to answer it, or if they are concerned that they did not answer the way they should have, it is important that the witness not be too hard on themselves. Depositions in particular, but sometimes trials too, are more marathons than sprints. It is more important to focus on the question currently on the table rather than the ones that went beforehand. Don't let mistakes throw them off for the rest of the testimony because it can be a downward spiral. Encourage them to keep moving

forward, and use redirect or other techniques for clarifying the testimony if necessary. The more the witness can stay focused on the present, the less likely it is that they will make another mistake.

Remind them of their purpose. It is important for a witness to understand their part in the lawsuit—why they are being called to the stand. This helps them focus on what is important, but also helps them put things in perspective. When they are asked questions within the realm of their purpose, they are better able to formulate appropriate answers. If they are asked questions outside of their purpose, they are more confident in saying they don't know or bringing the answer back around to what is important.

Address their fears head on. Always ask the witness if there is any question they are afraid they will be asked, or any topic that concerns them. Witnesses often worry about personal embarrassment or being asked questions for which they do not know the answer. By addressing these concerns beforehand, you can put their mind at ease, whether by practicing how to respond to those questions if they come, or explaining what you can and cannot do if opposing counsel gets too far afield with the questions. Dealing with the questions they fear the most helps put the witness at ease.

Practice the hard parts. There are challenges in every case. Identify the weaknesses in your case, and the witness's story in particular, and practice how to answer the questions that will come up on

cross-examination. Sometimes, it is easier to ask a colleague to play that role since you may not be able to be as hard on your client as someone else will be. A lawyer can head off a lot of the anxiety associated with the harder examination topics by giving the witness practice answering difficult questions while preparing. This is also where you can reinforce the purpose of their testimony, and give them "safe" zones to head to when they feel lost.

Know and recognize the signs of anxiety. Observe the witness during your prep sessions when they are subjected to cross-examination so you can recognize how they manifest their anxiety. They may become talkative; they may fidget; they may change their posture, or become defensive. Pointing out these responses to them before they are on the stand will give them an awareness and help reduce the chances they will do it on the stand.

Plan ahead for redirect. Although you don't know exactly what another attorney will do on cross-examination, you can plan for contingencies. And, you can prepare your witness about what you might ask them on redirect to get the train back on the tracks since you often don't get to talk to them in between the cross-examination and the redirect. Ask the redirect questions calmly and let the witness do the explaining. Try not to lead.

Strategies for Regaining Control While on Direct Examination

Generally, witnesses feel much more comfortable on direct examination because this is pre-planned and practiced. The questions are from a friendly face. But, sometimes witnesses do lose their way on direct examination. Getting the witness back on track is a little easier because the witness's lawyer is doing the questioning.

Revert to questions that are easy for the witness. Asking questions at the beginning that are easy to answer can help them settle into their role when their examination starts. Giving the witness softball questions can rebuild the witness's confidence quickly and help calm their nerves by putting the witness back on familiar territory. This is especially useful if the witness becomes confused or forgetful. During preparation, have some "safe subjects," that are planned ahead of time, and take the witness back to those. Give more context clues in the question to see if that helps eliminate the confusion and gets the witness back on track.

Break the questions into bite-sized pieces. Spoon-feeding the witness with easy to answer questions (see above) that break down the story into smaller pieces can help the witness tell a richer story and tell it with more confidence. The lawyer can sometimes take responsibility for a "bad" answer by apologizing and claiming it was a bad question so the witness is not left feeling like they have caused a problem.

Slow down. Slowing down the pace of the questions helps reduce anxiety, and gives the witness the opportunity to catch their breath. If you take a moment between questions without making it seem like you are waiting for the witness to continue, you can indirectly give the witness the assurance that you have sensed their anxiety and are taking things slower.

Speak calmly and reassuringly. If the lawyer becomes nervous or anxious about the witness's testimony, the witness will pick up these cues, and will assume they are the source of the anxiety. By remaining calm, the lawyer reassures the witness through his or her body language, demeanor, and cadence.

Carefully use leading questions to prompt the witness. Mastering the art of leading a witness on direct can make for a smoother direct that appears more conversational, and puts the witness at ease. They know you will prompt them if they forget something, or if they get confused, and this makes them feel less anxious about making a mistake. But, it must be done carefully so that the lawyer does not take control of the testimony and overshadow the witness.

If all else fails, use methods to refresh recollection. There are specific evidentiary methods for helping the forgetful witness, but if the issue is important, the witness's inability to recall it may impact their credibility. Use these methods sparingly, but if necessary, the lawyer can refresh the witness's memory. Just knowing this gives witnesses some comfort.

Strategies for Regaining Control While on Cross Examination

If you search for articles about control on the witness stand, the results relate to techniques for the lawyer to control the witness rather than the other way around. Myriad books have been written about the art of cross-examination and the importance of controlling the witness during that examination. Very little has been written about how the witness can maintain or regain control during that process. However, much of the same advice for an effective cross examination applies equally well to the witness.

Stay calm. Take a deep breath to maintain your composure. Taking a deep breath and being aware of a physical response to a stressful situation can help the witness feel more in control. It buys time for the witness to think about the question they are being asked and to formulate their response. The witness should practice pausing before each answer during prep sessions to train the witness to do it by reflex.

Listen carefully. Remind the witness to listen carefully to the question being asked and answer only that question. Rather than anticipating the questions and trying to stay one step ahead, just listen. The witness can ask that the question be repeated to make sure they heard it correctly. The witness can take control of the cadence by taking their time to answer.

Don't try to do too much. There is an expression that "pigs get fat, and hogs get

slaughtered" that is often used to remind lawyers not to get greedy on cross-examination by asking too many questions. The same can be said for a witness. If a witness tries to explain too much or embellishes the story in hopes of making their case better, it can end up harming rather than helping the case. It helps to remind the witness of their purpose, and of not trying to do too much during cross-examination.

Don't be bullied. If the lawyer puts up his hand to stop an answer he or she does not like, remind the witness they do not need to stop their answer. If they are interrupted with another question, they can explain they were not finished with their last answer. The witness should never become combative or argumentative. To the extent the other lawyer behaves aggressively, it generally takes care of itself because juries do not like mistreatment of witnesses, especially if the witness is trying to be cooperative.

Memorize Prior Testimony. If the witness has been deposed or given a written statement, the witness should know exactly what she or he has said before. Too often, witnesses do not take the time to review their prior testimony and they attempt to embellish the story, or forget important details, not realizing they have previously told a slightly different story. Keeping the testimony consistent, or having an explanation for why it is not consistent, is critical to the credibility of the witness, and can negate a powerful tool on cross-examination.

Conclusion

When a witness feels lost or confused on the stand, they should hear their lawyer's words of encouragement in their head telling them to remain calm, listen carefully to the question being asked, and remember why they are on the stand in the first place. Lawyers spend a lot of time preparing the witness on the substance of their testimony, but often the emotional toll of testifying in a trial or at a deposition is overlooked. It can come as a surprise to the witness when their nerves get the better of them, and to the lawyer when a star witness starts to fall apart unexpectedly due to anxiety. When the witness has been properly prepared for this contingency beforehand, they are better equipped to calm themselves.

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