

Good Counsel

Directing Examination

Your role in witness examinations is to move out of the spotlight. Try to create a theater-like atmosphere where the jury is the audience, the witnesses are the actors, and you are the director.

Ask questions that jurors would pose if allowed to do so. Help witnesses shape their answers to fit jurors' life experiences and perceptions. Do not unnecessarily interfere with the flow of information from witnesses to jurors.

To foster jurors' perceptions of you as a sincere and caring person, allow jurors to engage in an adventure. They are listening to a fascinating story unfold, but you are no longer the storyteller. Your role is more of a moderator or commentator. Quietly and subtly enhance each witness's ability to relate to the jury.

Murray Ogborn
Denver, Colorado

Make Yourself at Home

Many of us spend more time working in a home office than at our law firms. Follow these tips if you're going to create an office for yourself at home:

- *Be sure that your home office has an adequate electrical supply.* I suggest a separate circuit dedicated to your office equipment. You don't want your computer rebooting or "bits dropping" when a family member uses a hair dryer. Be sure that all electronic office machines are plugged into surge protectors, just as they should be at your business office. One bad spike can ruin a computer or at least that brief you just spent hours writing.
- *Install a multiple-line phone outlet.* You need to have at least two phone lines at home. One will be your personal line; the other will be dedicated to business uses, such as calls from your staff, computer connections, and faxes. Modern answering machines permit you to use one line to handle incoming faxes and calls, separating them as needed. If you spend a lot of time at home when other family members are present, you may need a third line so you can receive business calls while maintaining a computer connection and let your kids make calls at the same time.
- *Consider wiring your office with optical fiber for connection to new phone lines being installed today.* Phone companies will be extending their use of optical fiber to just outside your home. If you can continue that connection into your office, you will be ready for the next advent of high-speed digital communication, including the information superhighway and videoconferencing.

Donald H. Slavik
Milwaukee, Wisconsin

AN OPEN-AND-SHUT CASE

Far too much distinction is made between opening statement and closing argument. The underlying assumption of those who make this distinction is that these two segments of trial are completely different species of verbal presentation. One is presumed to be a “statement” while the other is an “argument.”

In fact, each has the same goal: to persuade the jury to your point of view. In each of these presentations, the attorney is governed by the same obligation to deal with the facts clearly and honestly. The lawyer is not entitled to be more careless in closing argument than in opening statement.

These presentations merely required different persuasive techniques. Although courts permit a more argumentative technique to be used in summation, counsel should not assume that the restraint on argumentative technique is an opening and must limit persuasive technique.

William L. Keating
Denver, Colorado

For the Record

At trial, take precautions to ensure that a proper record of the demonstrative aids is being created along with the record of exhibits actually introduced into evidence. Even if the aid will not be introduced into evidence, the attorney using it should refer to it by exhibit number. Some verbal description of what is being portrayed by the exhibit should be stated for the record so that appellate court will understand the trial transcript.

While nonevidentiary visual aids are not exhibits, they should still be marked, not only to complete the record as to what was being said during witness examination, statement, or argument, but also to validate the visual aid in the jury’s mind as an official part of the process.

I also recommend photographing all oversized exhibits and making those photographs a part of the record. The photographs not only preserve the exhibits and serve as an aide to preparation for the summation, but they can be handily carried home or back to the office for review. The photographs should also be included as a part of the record to give the appellate court a full appreciation of what transpired at trial.

Thomas William Malone
Atlanta, Georgia

Taking the Wheel

Unlike prepared opening statements and closing arguments, witness examinations are dynamic. In direct examination, the lawyer must share control of events with the witness.

In cross, when you have problems getting a witness to answer your questions, try these “control” techniques:

- Have the court reporter read the question back.
- Let the witness ramble, and then politely ask the witness if he or she remembers the question.
- Take the blame for asking an unclear question.
- If the witness jumps ahead, say, “We will get to that.”
- If the witness rambles but you think the answer was a yes, ask, “Is that a yes?”
- Hold up your hand as an indication to stop.
- Appear puzzled and ask the question again.
- Know the facts and show it.

Gregory S. Cusimano
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