Refreshing Recollection

Just as it is important for the attorney to prepare to cross-examine adverse witnesses, he must properly prepare his own client and witnesses for the ordeal of cross-examination by the opposition. Simply going over the witnesses’ testimony with them in a casual and conversational manner shortly before trial is insufficient. Generally the trial takes place weeks, months, or even years after the events that are the basis of the suit; in this time interval recollections fade, and imagination often takes the place of true memory. As a particular incident is told and retold over a period of time it assumes embellishments that bear but slight resemblance to the actual occurrence. By going over each witness’s testimony with him before trial, counsel can refresh the witness’s memory and correct distortions of fact.

Clarifying Ambiguous Language

The meaning and color of a word, phrase, or sentence may vary according to its context—the circumstances and time in which it is used. If a question is not fully understood or the reply not properly phrased, the answer may be construed to mean something quite different from or diametrically opposed to what the speaker intended. An indefinite, equivocal answer to a positive question may allow the cross-examiner to argue that the witness’s testimony supports what the witness intended to contradict. Conversely, a positive answer to an ambiguous question can be misinterpreted. Counsel can reduce ambiguities and misinterpretations by going over the testimony of his witness with care, not to change or avoid the truth but to be sure that only the truth is developed at the trial. For example, counsel can alert his witness to questions containing double negatives. If, despite preparation, a witness gives an ambiguous answer on cross-examination, it should be clarified on redirect examination.

Preparing Client

In practically all cases, civil or criminal, the lawyer’s client is the most important witness he can call to the stand. Just because the attorney and the client have discussed the client’s testimony shortly after the event does not mean that they need not go over the facts again shortly before trial. A clear understanding by both about the facts in issue and the questions likely to be asked on cross-examination of the client will do much to ensure a successful outcome of the case. After counsel has availed himself of all applicable pretrial discovery proceedings (he must proceed to prepare his client with great care for cross-examination by...
Steps In Preparation

The advantages of this procedure are that the attorney does not have to flounder around in questioning his client, and the witness can give a clear and chronological account of the matter. First, counsel must discuss with his client everything he has ascertained by pretrial discovery proceedings and learn whether this information is reliable and correct. The client should give his version of the affair, and counsel should make notes of the explanation. Then the attorney can prepare a list of the questions that may be asked of the client by counsel himself and by the attorney for the opposing side. The questions should detail every aspect of the case. This does not mean that the lawyer will ask every question on the list in his direct examination, but he must include every question he thinks the opposition might possibly ask. The questions should start with some personal history of the witness—his age, schooling, occupation, marital status, etc. If prior written or oral statements about the case or admissions were made by the client, he should be questioned about them. Questions about damaging statements by other witnesses should also be put on the list. The list can be arranged in chronological order or divided into direct examination questions and cross-examination questions. Leave a space after each question for the client’s answer, and give him one copy to fill in just as he would answer in court. The client should do this out of the lawyers' presence, with no coaching or suggestions from his attorney.

The following questions are taken from a list prepared for a client accused of receiving stolen goods in a case tried in both the criminal and the civil courts:

**Examination**
- Q. What is your name?
- Q. How old are you?
- Q. Are you married?
- Q. How many children do you have?
- Q. Do you, your wife, and your children all live together?
- Q. What was your schooling and education?
- Q. What is your business, profession, or occupation?
- Q. Are you now employed?
- Q. For how long have you been employed and by whom?
- Q. Do you know a man named Mr. X?
- Q. How long have you known him?
- Q. On February 18, 1965, did you hear from Mr. X?
- Q. Did Mr. X come to your office on February 18?
- Q. What time did Mr. X arrive?
- Q. When you first saw Mr. X on the day in question, what was said by him?
- Q. What was then said by you and Mr. X—give the conversation?
- Q. After Mr. X told you that he had a friend who would like you to put a package in your safe deposit box for the weekend, what did you and Mr. X do?
- Q. After you and Mr. X left your office where did you go?
- Q. What route did you take to Mr. X’s hotel?
- Q. When you entered Mr. X’s hotel room, was any one else there?
- Q. When you were in the hotel room, was anything given to you?
- Q. Did you at any time know what was in this paper bag?
- Q. What did you do with this bag?
- Q. When you put the contents of the bag in your safe deposit box did you then or at any later time before your arrest know that the contents of the bag consisted of stolen jewelry?

**Cross-Examination**
- Q. What is the occupation of Mr. X?
- Q. Did he have a place of business?
- Q. Where was it located?
- Q. Did the police treat you in a nice manner?
- Q. Did you stay with Mr. X during the first trial of this case?
- Q. Did you during court recesses walk up the street with Mr. X?
- Q. Did you know that Mr. X had implicated you in the robbery of these articles of jewelry?

**Comment:** These are only a few questions selected from a list that went into meticulous detail about every phase of the case. It covered 30 typewritten legal-size pages in all, including spaces for answers.

**Review of Answers**

After the client has written his answers, the lawyer must go over them and interrogate him on any new
matter that may be suggested by the answers. If any answer is equivocal it should be made definite and clear. These additions to and changes in the answers are noted in writing. Counsel must make sure that the client’s answers to questions about prior statements or admissions explain any inconsistencies between his present contentions and the prior statements. This will avoid uncertainty or surprise on the part of the witness when he is cross-examined about the prior statements. Similarly, the client should be prepared to give explanations for damaging statements that adverse witnesses have made, if he is confronted with them on cross-examination.

After the conference reviewing the client’s answers, a new set of questions and answers clarified by the client is prepared. The client is given a copy to study, and he and the lawyer should go over it on several occasions. The day or night before the client is to testify, counsel should ask him all the questions, and he should be able to answer without reference to the list. The list is returned to the lawyer before the client takes the stand.

Factors in Attorney’s Decision

Counsel should consider the following points when making this crucial decision:

1. Will the client make a good witness? Will his actions and demeanor on the stand tend to engender in the minds of the jurors a belief that he is telling the truth? The fact that the client is innocent, free from negligence, or not guilty of wrongdoing does not necessarily mean the jurors will believe him. Because he is unaccustomed to appearing as a witness, he may be nervous and become easily confused. He may have a poor memory and be unable to recall, with any degree of certainty, times, dates, conversations, or important events. Under these circumstances, he will not make a believable witness, will make a poor showing on the stand, and may give the jury the impression he is lying.

2. How credible is his testimony? Truth is sometimes stranger than fiction. The client’s story, though true, may be so out of the run of ordinary events that it will sound highly improbable.

3. Is the defense based on a question of law or of fact? Is the legal problem so clearly in favor of the client that it demands an answer favorable to counsel’s case? If so, nothing can be gained by putting the client on the stand.

4. Can the salient facts in support of the client’s case be developed and proved by other witnesses? If so, and the client will be a poor witness, there is no use subjecting him to what may be a destructive cross-examination.

Preparing Lay Witnesses

Lay witnesses other than the client also must be prepared to withstand cross-examination. If the witness has given a deposition, made a written statement, or made a tape recording, a copy of it should be furnished to him an appreciable time before trial with the request that he study it, not only to refresh his memory but also to discover and clarify any equivocal statements and to explain any damaging statements, if this is possible. The attorney should then interview the witness, going over the testimony that will be sought from him on direct examination and cross-examination. If the witness has made no prior written or recorded statements, the interview with the attorney should be reduced to writing and a copy furnished the witness with directions to make any necessary truthful corrections or additions.

For some reason many witnesses think they are not supposed to talk to the attorney about their testimony before taking the stand. The cross-examiner often asks; "Before taking the stand here today did you talk about your testimony to the attorney who called you as a witness?" It is common knowledge that a lawyer is not going to call a witness without learning what the witness will say. The negative answer may permit opposing counsel to argue that the witness is not worthy of belief or may raise such a doubt in the minds of the jurors. Counsel should advise the witness that he is to admit freely that they have discussed the case and testimony on more than one occasion and to tell, if asked, when the last discussion took place, even if only the evening before testifying.

The witness must be told not to be afraid to admit that he does not recollect something. Many witnesses believe they are under a duty to remember everything they saw or heard. Failure of memory is not uncommon. If the witness honestly does not remember a particular incident or conversation, he should say frankly, "I do not remember." Counsel should advise his witnesses that if they do not understand a question put to them by opposing counsel, they must not guess what facts are sought, but should state: "I do not understand the question."

To Testify from Knowledge of All the Facts

In order for the expert to withstand an exhaustive and minute cross-examination, he must be made con
To Answer Hypothetical Questions

Assume that counsel is well prepared. The witness should probably know more about the subject than cross-examining counsel, he should not suppose that counsel cross-examination. The expert should never assume opposing counsel is a fool. Although the expert intended to make or to exaggerate his opinion to the point of absurdity. Counsel should warn his expert and make him lose his temper. This tactic is used to induce the witness to blurt out some statement he never and may affect his credibility. At times, cross-examining counsel may attempt to anger the expert witness and stand. Arguing with opposing counsel can only detract from the weight of the witness's testimony. Counsel should caution his expert not to assume this adamant attitude. It is better to agree that anything is possible and qualify the admission by explaining the remoteness of the possibility. A famous testimony. Counsel should caution his expert not to assume that phase of the matter. Many experts will not concede the possibility of minor points contrary to their opinion, irrespective of what effect it may have on one side of the case. In fact, if he does not have a definite opinion on the matter, he probably is not qualified to testify. Opposing counsel can make the most of this.

In expressing his opinion the expert should avoid using obscure or technical language. If the witness describes something in technical words or a foreign language, he should immediately explain the terms in simple English. The jurors are not experts or versed in the subject. If the expert unnecessarily uses a high-sounding phrase for something as simple as a common stomach ache, this may be revealed on cross-examination to the detriment of the expert's testimony. The expert should be warned never to guess if he does not know the answer to a question. If opposing counsel can prove a guess to be wrong, it may destroy the effect of the witness's previously impressive testimony. Even an expert should feel free to admit that he does not know an answer, stating, "I do not know the answer to your question," or "I have no opinion on that phase of the matter." Many experts will not concede the possibility of minor points contrary to their testimony. Counsel should caution his expert not to assume that adamant attitude. It is better to agree that anything is possible and qualify the admission by explaining the remoteness of the possibility. A famous medical expert once was asked if a certain result, contrary to his previously given opinion, could possibly happen. He answered, "Yes, anything is possible. It is possible that a mare may foal a five-legged colt. The possibility of anything happening or resulting as suggested in your question is just about as likely as that of the mare throwing such a five-legged colt." On the witness stand, the expert should adopt the attitude that he is appearing as an objective observer, not a partisan. He is there to tell the truth and to give his honest opinion, irrespective of what effect it may have on one side of the case.

Not to Argue with Opposing Counsel

Many experts fall into the trap of arguing with opposing counsel. This should be avoided at all costs, The expert is presumed to be a man of learning. He should maintain a dignified and impartial attitude on the witness stand. Arguing with opposing counsel can only detract from the weight of the witness's testimony and may affect his credibility. At times, cross-examining counsel may attempt to anger the expert witness and make him lose his temper. This tactic is used to induce the witness to blurt out some statement he never intended to make or to exaggerate his opinion to the point of absurdity. Counsel should warn his expert about this strategy and stress the importance of maintaining a calm and dignified attitude when undergoing cross-examination. The expert should never assume opposing counsel is a fool. Although the expert probably knows more about the subject than cross-examining counsel, he should not suppose that counsel lacks any knowledge. Counsel has consulted with and been advised by his own experts. The witness should assume that counsel is well prepared.

To Answer Hypothetical Questions

Full disclosure allows the witness to pick out the facts on which he bases his opinion. The lawyer generally does not have the knowledge or ability to choose pertinent facts. Facts considered to be of no importance by the lawyer may be of the utmost importance to the expert; those considered very important by the lawyer may be of no importance to the expert. Often, when an expert has given his opinion on many facts, he is asked on cross-examination which of the facts he considers essential in supporting his opinion. Opposing counsel may then mention other facts in the case and ask the expert about them. The witness possessed of all the facts can explain away those that, in his opinion, have no bearing on the case. Opposing counsel cannot take him by surprise by relating facts of which the expert was unaware and then asking if his opinion would be the same if these were added to the facts on which he based it.

Similarly the expert must be supplied with all available physical evidence. Charts, hospital records or similar data, and depositions or statements taken of opposition experts prior to trial should be made available to him. Counsel should try to ascertain and inform his expert of the results of any tests or experiments the opposition has made on physical evidence.

Many expert witnesses believe they are to testify on the consensus of authors, lecturers, or other experts on the subject. This is not their job. The examination calls for the personal opinion of the witness. This opinion may be based on the witness’s reading, training, experience, or a combination of all three, but it is only his personal opinion that is called for by the questions. If the expert cannot form and testify to a definite and positive opinion on the subject, counsel should not call him as a witness. A witness who expresses an equivocal opinion or states that a certain conclusion could or could not be true will not support counsel’s case. In fact, if he does not have a definite opinion on the matter, he probably is not qualified to testify. Opposing counsel can make the most of this.
It would be foolish to read an expert witness an extremely long set of facts and ask his snap judgment and opinion on them. A copy of the question should be furnished the expert several days before he is to testify, so that he can analyze the facts and form his opinion. This also allows the lawyer to go over the hypothetical situation with the witness before trial and decide just what questions are to be asked. When testifying, the witness should have a copy of the hypothetical question in his hand. As a courtesy, copies of the question should also be given to opposing counsel and the judge.