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THE KEY TO AN EFFECTIVE EXAMINATION: FOCUSING ON THE WITNESS' ANSWERS, AND ASKING APPROPRIATE FOLLOW-UP QUESTIONS

By Ben Rubinowitz and Evan Torgan

While many lawyers expect to have their own witnesses provide testimony on direct examination consistent with the preparation of the witness undertaken prior to trial, often their in-court testimony varies considerably from that which was expected. Generally, this is due to a good amount of in-court anxiety from both the witness and lawyer causing a lawyer's carefully laid out examination to go awry. The trial lawyer who is more focused on the notes on his legal pad than the answers being given in court is not providing a service to his client. Indeed, the "pad-bound" lawyer has failed to adhere to two basic rules of trial advocacy which can destroy an otherwise compelling case. The principles of "listening" and "looking" might sound basic and rudimentary but following them, paying proper attention and letting go of the notes is essential for a successful outcome.

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LISTENING

The best trial lawyers are those that listen carefully. The goal of the lawyer should be, at all times, to listen to the answer provided by the witness and continually evaluate the sufficiency of that answer immediately after it is given. If the answer does not provide support for final argument, additional questions must be put to the witness until the answers provide for a cogent, compelling and winning argument on summation.

A gross example of the "pad-bound" lawyer not listening to the answers can be readily seen in the following example:

Q: Where do you live?

A: Two children.

Q: How many children do you have?

A: 14 and 16 years old.

Q: How old are your children?

A: Yes, it was a heart attack.

Needless to say, in this example, both the witness and lawyer were not listening to each other, not paying attention to each other and not working to create a winning position. In this circumstance, the jury will likely disregard the witness' entire testimony as canned, suspect and not worthy of belief.

While the above example is clearly an overstated one, less severe but more realistic examples can also spell disaster for the trial lawyer who fails to listen. Consider the following scenario in which a pedestrian was injured in an automobile accident. In

setting the scene, the injured pedestrian's attorney asks about the weather and traffic conditions. Assume the traffic and weather conditions are central issues in the case:

Q: Describe the weather conditions at the time of the accident.

A: The weather was good.

Q: Describe the traffic conditions at the time of the accident.

A: Traffic was okay.

Q: What happened next?

Here, the answers provided by the witness, although common, provide no meaningful information whatsoever. It is up to the lawyer to correct the poorly phrased answers immediately. Equivocal or ambiguous answers demand follow-up. One of the easiest methods to cure the problem is to feed the witness' own answer back to him while at the same time searching for greater detail:

Q: What do you mean when you say the weather was "good”?

A: It was a beautiful, clear and sunny day.

Another approach to ensure sufficient detail is, in effect, to tell the witness that the answer was unsatisfactory and that much more detail is needed:

Q: Tell us exactly what it means when you say traffic was "okay”?

A: Traffic was moving steadily at about 25 miles per hour. It was not bumper to bumper but I would say it was moderate.

Even here, the word "moderate" might call for explanation:

Q: Describe what you mean by "moderate."

A: There was about 50 to 75 feet separating the cars.

Often, words that we take for granted are the most problematic. Words such as "tall", "short", "old", "young", "pretty" and "ugly" have different meanings to different people. The trial lawyer's job is to provide clarification before ever moving forward with the witness' examination:

Q: What do you mean by "tall"?

Q: When you use the word "short" tell us what that means in terms of feet?

Q: Tell us in years what you mean by "old."

Q: When you say "young", what age are you talking about?

Q: Describe what you mean by "pretty."

Q: What does "ugly" mean?

While the above examples deal with direct examination, the same rule applies to cross examination. Listening to the answer during cross and scrutinizing the response is not only helpful, but essential. Many times during a hard-fought cross the witness will purposely or deliberately try to avoid answering the question in a straightforward manner. Instead, the witness might try to offer a response that, on the surface, seems to answer the question, but on reflection was non-responsive. Consider the following questions and answers on cross:

Q: Doctor, did you review the lab values of June 12th?

A: I reviewed the patient's chart.

Q: Doctor, did you also review the MRI scan of the same date?

A: As I said, I reviewed the chart.

Needless to say, in this example, the witness offered non-responsive, evasive answers. While too many attorneys might allow answers like these to stand without follow-up, the lawyer who listens knows that not only was follow-up required, but that the witness needs to be put in his place by rephrasing the question, changing the tone of voice in which the question was asked and demanding a responsive answer:

Q: Doctor, while we understand you reviewed the chart, my question was specific. (Louder) Did you ever once review the lab values of June 12th?

Q: Doctor, the MRI scans themselves are different than the MRI reports true?

Q: (Louder) Did you, at any time while the patient was in the hospital, ever review the MRI scans?

Not only is it essential to listen while questioning a witness on direct and cross, it is equally important to listen to the answers while a witness is being examined by your adversary. Often, during cross examination, a witness might be boxed into an answer that was carefully crafted by the examiner, but the witness wanted to explain or offer a more detailed answer than was permitted. Those hints, offered by the witness, must be addressed during re-direct or they become lost opportunities that have the potential to damage the thrust of your case.

Consider the following responses offered by a witness in response to the cross examiner's interrogation:

A: I agree, in part.

A: To some extent, that's correct.

A: Generally, I agree.

A: Yes, but.

Here, the witness has hinted that follow-up is needed. Failure to inquire on re-direct as a result of a failure to listen will spell disaster. On the other hand, meaningful follow-up is straightforward and simple:

Q: Explain what you mean when you said that you agreed "in part."

Q: What exactly were you referring to when you said that it was correct "to some extent"?

Q: While you indicated that you agreed generally, tell us your position specifically with reference to this case?

Q: What did you want to tell us when you said "yes, but"?

LOOKING

While it is one thing to hear the witness' answer, the "pad-bound" lawyer who fails to watch both the jurors and the witness is making a big mistake. If the jurors have quizzical looks on their faces, further explanation is mandatory. The failure to take notice of the jurors while questioning the witness is presumptuous -- the attorney is merely assuming that that which he has prepared is sufficient. On the other hand, the attorney who watches the jury's reaction to the testimony puts himself at a distinct advantage by knowing when to follow-up with more detail for further clarification.

At times, however, the witness and lawyer are actually communicating well. The examination is moving along as expected. The problem is that the words used by the

witness are meaningless without proper definition offered to protect the record. Consider the following questions and answers to illustrate the point:

Q: How big was the gun?

A: It was that big (showing).

Q: How tall was he?

A: About like that (showing).

Q: What did the man do with has fist?

A: He hit him like this (showing).

Clearly, each of these responses demands follow-up or the record will remain meaningless. The trial attorney must protect the trial record for a potential read back during jury deliberations and for clarity during appellate review. Generally, there are two ways to cure such responses. The first is to let the record reflect what the witness' hand gestures mean by making a short oral request to the Court:

"Your Honor, may the record reflect that the witness held his hands approximately 10 inches apart while describing the size of the gun."

The second approach simply forces the witness to use his own words to clarify:

Q: Tell us what you mean, in words, when you say "it was that big."

Q: Tell us what you mean, in feet, when you say he was "about that tall."

Q: When you say "he hit him like this" describe, in words, what you mean.

CONCLUSION

While meticulous preparation is always necessary to succeed as a trial lawyer, planning alone is not enough. Indeed, one must always stay vigilant to ensure that the

execution of your trial strategy stays in line with your original plan. A skilled trial lawyer must always "stay in the moment", focusing on how the evidence is being offered and how the jury is accepting it.

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