

Legal Letters by Andrew Agatston Legal List 10/22/12

“The Big 5-0: 50 Ways To Improve Your Testimony”

Taking Your Inventory

1. What is it about you that help you effectively explain things to others? Take an inventory of your “explaining” skills. Are you good at describing? Are you good at defining? Teaching? Using analogies to break down complexities?
2. What are the qualities of other people that have allowed you to understand things? Was it patience? Tenacity? Candidness? A sense of calm?
3. What tools of persuasion have you used over the years to help others make important decisions? Remember that at trial, the general rule is that an expert cannot testify as to the ultimate issue, i.e., that the defendant molested the child. So it is important that a witness can present information and facts in a conclusive and effective manner that allows the jury to draw its own conclusions from the information.
4. After taking an “inventory” as set out in No. 1-3, you’ll realize that you already have tools you can immediately put to use when testifying.

Preparation

Pretrial preparations pay off in the courtroom. When you find out the trial date, it’s time to be proactive. Always have a mindset that the case will be tried, that it is not going away, that it will not plea out, and that you will ultimately be on the witness stand. In other words, don’t “wish” the trial away.

Start reviewing your materials that you have created. Review them with a critical eye, because you know the cross-examining attorney will.

Being proactive means making sure you speak to the attorney who has subpoenaed you early to understand when you will be called; why you will be called; what is expected of you; when you should arrive at the courthouse; and when the ADA who subpoenas you will interview you about your role in the case.

Being proactive is being able to tell the ADA who tells you that “I don’t need to interview you, you’ll be fine,” “Thanks, I appreciate that. But I have concerns I’d like to discuss. When can we talk?”

During your pretrial interview, make sure the lawyer who is interviewing you understands your documents, your credentials, your findings, your investigation, and your concerns. Do not provide incomplete information to the interviewing lawyer, or else nasty surprises can happen during the trial.

Pre-Pretrial preparations pay off in the courtroom. It’s when the initial document is created -- well prior to trial -- when proper procedures and protocols are so important to follow, and will pay off at trial.

Pre-Pretrial preparations also include having regular meetings with fellow staff members about testifying in court, and discussing courtroom experiences in detail.

Pre-Pretrial preparations also include having meetings to debrief fellow staff members who have testified, following the trial and after they are no longer sequestered, to hear about their experiences and offer feedback.

Pre-Pretrial preparations also include staying current on the authoritative literature in your field. You are a complete professional, which means doing everything you can do to know the authority, and doing everything you can to be the authority. Why not you?

Pre-Pretrial preparations means going to every professional workshop or conference or meeting you possibly can. Besides professional growth, it allows a lawyer to help qualify you as an expert. Remember the expert formula: skill and/or education and/or experience and/or training = expert.

The Target Audience

Understand the majority of jurors do not want to be put on the jury, while also understanding that most jurors will be motivated and diligent in the discharge of their duties.

Once jurors learn the type of case at issue -- child molestation -- it is going to be upsetting for some or even most of them.

Respect their feelings.

How? By respecting their presence with your professionalism.

How? By respecting their presence by being prepared.

How? By respecting their presence by being concerned.

How? By respecting their presence by being “on-task” and “about this case.” What do I mean by “about this case?” Sure, you have multiple other cases you are working on that are

important. But this is the one case these jurors will ever sit in judgment on. So for you, there can be no other case more important than this one, and you must be engaged in it.

How? First, by dressing the part. Show up dressed professionally, and err on the side of conservative dress. That snappy eclectic tie is just going to cause some juror to stare or daydream or judge or miss what you're saying. You want jurors to pay attention to what you say, not what you wear.

How else? By understanding that jurors have expectations, and most of them are not from first-hand experience with trials and litigation. There are expectations generated by the news media, by political discussion, by TV shows, by religion, or any number of outside influences.

So what, you say? I say, it makes a difference, even down to the smallest details. The little details can sink us. For example, when you're called into the courtroom to testify, only bring yourself and any documents you were required to bring, either by subpoena or because the lawyer told you to bring them. Don't bring your briefcase, your purse, your file folders, overcoats, bottled water, cell phones. You don't want to look frazzled or harried when walking into the courtroom in front of jurors. You want to look confident and comfortable -- like you've been here before.

Understand how people like jurors make decisions these days -- quickly! Get to the point with your answers. Try to make every word count.

Understand a general courtroom principle: less is more.

When you want to do more, pause, focus, and then remember general courtroom principle.

In sum, jurors are the most important people in the courtroom.

Presentation

29. There is no need whatsoever to stare or look at the jurors as you pass them in your march toward the stand. Walk straight and confidently toward the witness stand, get there, remain standing until you are sworn, say “I will” and sit down. After the first question, tell them your name loud and clear.

30. Define what you do clearly and concisely. Before the trial, try defining what you do as a forensic interviewer as if you’re telling a 12 year old. Then try out that definition to the people at your CAC. Refine it. Run it by the ADA. This preliminary information has got to be reliably understandable.

31. Surf the web for CACs. Look at the descriptions they use to describe their CAC and their CAC services. Many of them are quite good.

32. Remember that your testimony can be complicated. Remember what it was like learning your area of expertise the first time. Remember that the jurors are now in that boat, which by the way is a boat that they did not choose for a cruise.

33. Don’t just define yourself clearly, concisely and understandably. Also understand that some of your professional jargon may be introduced to the jury. If so, introduce the professional jargon and then define it in layman’s terms.

34. How? Think of Mona Lisa Vito in “My Cousin Vinny.” She was tendered as an expert in auto mechanics and introduced the concept of “positraction” to the jurors: “It’s a limited slip differential which distributes power equally to both the right and the left tires.” She then gave an

example of what happens with cars without positraction: “If you’ve ever been stuck in the mud in Alabama, you step on the gas, one tire spins and the other tire does nothing.” Perfect!

35. Make eye contact with the jurors -- all of the jurors, not just the one who reminds you of your favorite teacher -- when explaining or describing. You don’t need to look at them with every answer, but explaining or describing give a witness the chance to speak directly to jurors because you’re stringing together several sentences of important information.

36. Be ready to stand up in front of the jury to explain things. Be ready to go to the board to write things.

37. Because you are going to explain and/or write on boards, prepare in advance. Explain it to yourself in front of a mirror.

38. Speak clearly, and slowly.

39. Emphasize the critical points.

40. Know how to follow the attorney’s lead. She is in control of the questioning. She may take you a different direction than you’d like, but she is in charge of the examination.

41. Confidence! You work with children who have been abused! Jurors can appreciate that.

42. Keep your composure. Keep your cool.

43. Understand that the cross-examining lawyer may ask irrelevant questions. Understand the cross-examining lawyer may not know what he’s doing, or know the issues that need to be addressed. Still, don’t let your guard down.

44. Understand that the cross-examining lawyer may yell, may shake his head at you, may roll his eyes, may try to argue with you. You stay PRO-FESS-ION-AL.

45. On the other hand, understand that some cross-examining lawyers will not play games because they know the issues cold. Again, don't let your guard down. My definition of your guard: Your professionalism, competence, preparedness, and objectivity.

46. When the judge speaks, you stop.

47. Be prepared to think on your feet, meaning think when the unanticipated happens.

48. This isn't as hard as it sounds. When you know why you are being called and what is expected of you (See No. 8), you will know the limits of your testimony in the case. Many times the answer to the unanticipated can be directed back to the purpose of your testimony. If it cannot, then it may not be relevant to the purpose of your testimony and the answer "I don't know" may be very appropriate.

49. This is not your case to win or lose, so take that off of your shoulders. You are an important witness, but it is not your job to take the ball and run it from goal line to goal line. The prosecutor or the plaintiff's lawyer is responsible to manage the case, and put it in the best position to obtain the jury's verdict.

50. More to the point, remember that you are a piece of the puzzle and other witnesses will be called.

There you go: the Big 5-0. Are there more? Absolutely there are more, but there is nothing you cannot handle.

Good luck!

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