



**A Seat at the Table:
Witness Prep, Trial Examinations and Other
Essential Trial Skills for Young Lawyers**

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Panelists

- ▶ **Sanjeev Bhasker**, Assistant United States Attorney in the Western District of North Carolina
- ▶ **Judge Christopher Lui**, Los Angeles Superior Court
- ▶ **Laura Kingsley Hong**, Tucker Ellis LLP, Partner
- ▶ **Vinny Lee**, Mylan, Litigation Counsel

- ▶ **Moderator: Barbara Lum**, Thompson Hine LLP, Associate



Roadmap

- ◀ Substantive practice tips for young lawyers:
 - Effective Witness Preparation
 - Direct Examination
 - Cross Examination

- ◀ Vignettes



NAPABA Young Lawyer's Guide to Effective Witness Preparation



Effective Witness Preparation

◀ Selecting the witness.

- Knowledgeable witness
- Relates to the jury
- Understands the issues
- **YL Practice Tip:** Young lawyers may not have authority to choose the witness, but can give input based on knowledge of the record



Effective Witness Preparation

◀ Explain the basic rules.

- Make the witness comfortable with the process
 - ◀ Trial may not be what they have seen on TV
 - ◀ Understand attorney-client privilege
 - ◀ Understand applicable law



◀ Give general advice on testifying.

- ◀ Take time in answering questions
- ◀ Listen to the question
- ◀ Keep answers simple
- ◀ Do not guess or speculate
- ◀ Ask for clarification
- ◀ ALWAYS tell the truth
- ◀ Don't be afraid to say, "I don't know"



Effective Witness Preparation

- ◀ **Prepare witness for logistics of trial.**
 - Layout of courtroom
 - Where attorney will stand
 - Courtroom procedure and decorum
 - Attire



Effective Witness Preparation

- ◀ **Advise witness of main points to establish at trial.**
 - Advise of witness' role in presenting main points
 - **YL Practice Tip:** Do not try to make the witness memorize specific responses
 - ◀ May confuse and fluster the witness



Effective Witness Preparation

◀ Advise on “no-give” points in the case.

- If there are certain issues where the witness’s equivocal testimony could be damaging, prepare them to identify those questions and respond appropriately
- Identify pitfalls and provide examples
- **YL Practice Tip:** Be aware of potentially damaging testimony that concedes that outcomes are “possible” or “feasible”
 - ◀ Emphasize that testimony should consist of facts of which they have personal knowledge



Effective Witness Preparation

◀ Review all applicable facts.

- Past depositions
- Discovery responses
- All exhibits and demonstrative evidence
- Any other materials that may be presented or referred to at trial



Effective Witness Preparation

◀ Know your audience.

- Prepare the witness to present testimony credibly to the particular jury pool
- Explain how the witness's answers may affect closing argument or motion practice later on



Effective Witness Preparation

◀ Practice!

- Consider dress rehearsal or mock jury
- **YL Practice Tip:** Consider practicing in front of friends and colleagues



NAPABA Young Lawyer's Guide to Direct Examination



Direct Examination

◀ Non-leading questions.

- Who, what, where, when, why, or how
- Allow witness to take center stage and present the facts of the case
- Do NOT do most of the talking



Direct Examination

◀ Non-leading questions (con't).

- **YL Practice Tip:** Know when leading questions are prohibited
 - ◀ *E.g.*, the Federal rules prohibit lawyers from using leading questions on direct examination. Fed. R. Evid. 611
- **YL Practice Tip:** Know when leading questions are permitted
 - ◀ In certain situations, leading questions can be useful and non-objectionable
 - *i.e.* introducing an exhibit (“His this record one that is kept in the regular course of business?” “Is this photograph a fair and accurate representation of the scene?”)



Direct Examination

◀ Listen to the answers.

- Make sure that the witness has testified to each key fact that needs to be elicited at trial
- Ask for explanation of unclear answers or technical terms



Direct Examination

◀ Build a rapport.

- Show the jury interest in the witness' testimony
 - ◀ Nodding
 - ◀ Subtle facial expressions
- **YL Practice Tip:** Avoid relying on an outline or notes when questioning



Direct Examination

- ◀ **Use vocal inflections.**
 - Conversational and interesting
 - Rote questioning will bore the jury



Direct Examination

- ▶ **Keep the focus on the witness.**
 - Consider positioning yourself at the end of the jury box
 - Advise witness to make eye contact with the jury
 - Let the witness tell the story
 - Do NOT do all the talking



Direct Examination

◀ Keep questions short and succinct.

- Puts witness at ease
- Keeps jury focused as the testimony moves from point to point
- **YL Practice Tip:** Emphasize important testimony by repeating it as you move into your next question
 - ◀ “After you saw the green car move into the intersection, what happened next?”



Direct Examination

- ◀ **Consider addressing weaknesses on direct.**
 - The bad facts or weak testimony have less impact when volunteered and explained
 - ◀ This protects both the witness' and lawyer's credibility
 - **YL Practice Tip:** Start the examination on a positive note, disclose the unfavorable information in the middle of the examination, end on another positive point



Direct Examination

◀ Use redirect judiciously.

- Only use redirect to address main points that need clarification
- Know rules on scope



NAPABA Young Lawyer's Guide to Cross-Examination



Cross-Examination

◀ Consider whether necessary or helpful.

- Has the testimony adversely impacted the case?
- Is the witness important?
- Analyze the risks of cross-examining the witness?
- **YL Practice Tip:** Consider the purpose of cross-examination: eliciting favorable testimony that aids the case; or eliciting damaging testimony that will discredit the witness
- **YL Practice Tip:** Consider whether these goals must be accomplished through this witness



Cross-Examination

◀ Ask leading questions.

- No why, what, how questions
- **YL Practice Tip:** Put the desired answer into statement form, then precede it or follow it with a question phrase that can be answered with “Yes” or “No”:
 - ◀ “Isn’t it true that . . .?”
 - ◀ “Did you . . .?”
 - ◀ “. . ., isn’t that right?”
 - ◀ “. . ., correct?”



Cross-Examination

- ▶ **Be brief and to the point.**
 - Keep to a few basic points
 - Put strongest points at the beginning and end



Cross-Examination

◀ Control the witness.

- Do not permit the witness to explain his/her answer



Cross-Examination.

◀ Control the content.

- Do not ask questions to which the answer is not known



Cross-Examination

- ◀ **Do not argue with the witness over irrelevant details.**
 - May detract from attorney's credibility with the jury
 - Makes attorney appear petty



Q & A

**NAPABA Young Lawyer’s Guide to
Effective Witness Preparation**

1. **Selecting the witness.** Select a knowledgeable witness who will relate well to the jury and who understands the issues.
2. **Explain the basic rules and give advice on how to testify.** In order to make the witness comfortable with the process, standard advice on testifying usually includes:
 - a. Explanation of attorney-client privilege;
 - b. Discussion of applicable law in the case;
 - c. Advising the witness to take time in answering questions, to listen to the question, keep answers simple, not to guess, and ask for clarification; and
 - d. ALWAYS tell the truth, but don’t be afraid to say “I don’t know.”
3. **Prepare the witness for the logistics of trial:** Inform the witness about the layout of the courtroom, where the attorney will be standing, courtroom procedure and decorum, how to dress appropriately, etc. The more information the witness has, the more comfortable the witness will be.
4. **Make the witness aware of the main points you want to establish at trial and their role in presenting them.**
 - a. *Practice tip:* Do not try to make the witness memorize specific responses. This will only confuse and fluster the witness.
5. **Make the witness aware of “no-give” points in the case.** If there are certain issues where the witness’s equivocal testimony could be damaging, prepare them to identify those questions and respond appropriately.
 - a. *Practice tip:* Often, you will not want the witness to concede that outcomes are “possible” or “feasible”; instead have them stick only to the facts of which they have personal knowledge.
6. **Have the witness review all applicable facts.**
 - a. Review past depositions, discovery responses, all exhibits and demonstrative evidence, and any other material that may be presented or referred to at trial.
7. **Know your audience.** Prepare your witness to present testimony credibly to that particular jury pool and to answer with precision for closing argument or motion practice.
8. **Practice.**
 - a. *Practice tip:* Consider a dress rehearsal or mock jury. Consider practicing in front of friends and colleagues.

NAPABA Young Lawyer's Guide to Direct Examination

1. **Ask non-leading, open-ended questions** (who, what, where, when, why, or how). Leading questions result in the lawyer doing most of the talking; non-leading questions allow the witness to take center stage and present the facts of the case.
 - a. *Practice tip:* Know when asking leading questions is prohibited (*e.g.* the Federal rules prohibit lawyers from using leading questions on direct examination. Fed. R. Evid. 611.)
 - b. *Practice tip:* In certain situations, leading questions can be useful and non-objectionable – such as introducing an exhibit (“His this record one that is kept in the regular course of business?” “Is this photograph a fair and accurate representation of the scene?”)
2. **Listen to the witness's answers.** Make sure that the witness has testified to each key fact that needs to be elicited at trial. Ask the witness to explain any unclear answers or technical terms.
3. **Build a rapport with the witness.** Show the jury interest in the testimony. Consider nodding or using subtle facial expressions to convey interest or indicate to the jury how important the testimony is.
 - a. *Practice tip:* Avoid relying on an outline or notes when questioning the witness.
4. **Use vocal inflections.** Keep the testimony conversational and interesting; rote questioning will bore the jury.
5. **Keep the focus on the witness, not you.** Consider positioning yourself at the end of the jury box, so that the witness will make eye contact with the jury.
6. **Keep questions short and succinct.** Using simpler questions will put the witness at ease, and also keep the jury focused as the testimony moves from point to point.
 - a. *Practice tip:* Emphasize important testimony by repeating it as you move into your next question (“After you saw the green car move into the intersection, what happened next?”)
7. **Consider addressing weaknesses in case on direct.** The bad facts or weak testimony will have less impact when volunteered and explained. This protects both the witness' and lawyer's credibility.
 - a. *Practice tip:* Start the examination on a positive note, disclose the unfavorable information in the middle of the examination, end on another positive point.
8. **Use redirect judiciously.** Only use redirect to address main points that need clarification. Know the jurisdiction's rules on scope.

NAPABA Young Lawyer’s Guide to
Cross Examination

1. **Consider whether cross-examining the witness is necessary or helpful.** Has the testimony adversely impacted the case? Is the witness important? Analyze the risks of cross-examining the witness?
 - a. *Practice tip:* Consider the purpose of cross-examination – eliciting favorable testimony that aids the case; and/or eliciting damaging testimony that will discredit the witness – and whether these goals must be accomplished through this particular witness.
2. **Ask leading questions** (no why, what, how questions).
 - a. *Practice tip:* Put the desired answer into statement form, then precede it or follow it with a question phrase that can be answered with “Yes” or “No”:
 - i. “Isn’t it true that . . .?”
 - ii. “Did you . . .?”
 - iii. “. . ., isn’t that right?”
 - iv. “. . ., correct?”
3. **Be brief and to the point.** Keep cross examination to as few basic points as possible, and put the strongest points at the beginning and end of the cross-examination.
4. **Control the witness.** Do not permit the witness to explain his/her answer.
5. **Control the content:** Do not ask questions to which the answer is not known.
6. **Do not argue with the witness over irrelevant details.** This may detract from the attorney’s credibility with the jury and make the attorney appear petty.