



Finding your style for witness examination

FINDING INSPIRATION FOR YOUR TRIAL STYLE, AND THEN LEARNING TO PERFECT IT

To be in trial is to put on a performance, except instead of a fictional tale, you are recounting your client's actual experience. The jury is your audience, watching and evaluating every second you are in the courtroom. You can feel their energy while you are in trial, and sometimes can even feel shifts in that energy as certain witnesses are questioned. Just like in the theater, where the directors and actors might have different interpretations of the same material, in trial, attorneys can use different techniques to examine witnesses in order to bring their client's story to life.

Throughout my career I have had the opportunity to observe so many amazing attorneys in trial, all who have demonstrated these different styles: the "school teacher," who talked to the jurors and witnesses like they were students learning a new subject matter; the soft-spoken but self-assured attorney whose every word was heard despite its tone; the "take no prisoners" lawyer who aggressively pursued a line of questioning; the attorney whose friendly demeanor appeared relaxed, but who could get a witness to make certain concessions.

Early on I wondered what kind of trial lawyer I would become, and what my style would end up being. What I have learned is that there is no "one size fits all" and that your approach can continue to evolve, especially as you encounter different types of cases and witnesses. Each trial, however, requires the same determination and assurance that you can handle the roles that you are taking on.

I am by no means a trial expert and there are far more qualified attorneys who could talk about the art of storytelling. Instead, in this article, I will focus on how attorneys, especially newer attorneys or those looking to grow and challenge their skills, can find their own style to examine

witnesses at trial, and build to confidence in the courtroom.

Finding inspiration

Attorneys can read books on trial strategies and theories all day (and there are many great ones), but there is no substitute for watching a trial in action. Outside of practicing yourself, watching other attorneys demonstrate their skills is the best way to start figuring out how you can implement certain tactics and styles into your own practice. Check the CAALA List Serve or talk to friends to find out who is in trial and go down to the courthouse for a few hours to watch attorneys in action. More often than not, attorneys will be happy to spend some time speaking to you about what you are watching. This can also be a great and easy way to build your network.

When watching other attorneys, the goal shouldn't be to copy them – each person has their own unique style that can't be replicated. But you will quickly realize that great attorneys can change how they approach different types of witnesses, and this is the skill that you should want to emulate. These attorneys use tone, inflection, pauses, emphasis and repetition, body language, and movement to get their points across to emphasize the story they are conveying to the jury.

Consider a younger, more soft-spoken defendant driver in a motor-vehicle case: trial attorneys may not approach this witness the same way they will approach the head of a property-management company who is trying to hide their wrongdoings for creating a dangerous condition, even though both are defendants. The former requires a much lighter touch so that the jury does not perceive the attorney as overly aggressive.

Even within the category of defense expert witnesses, there are varying ways to approach each one. Sometimes you get a defense expert who will Not. Stop. Talking. And you need to get the jury

involved to instruct them not to run on. That, in itself, is a tactic to show the jury that you are the reasonable one that the judge is agreeing with over the expert. Or perhaps you have an expert who is doubling down on ridiculous positions and you can use pauses or repetition to emphasize to the jury how unbelievable the expert is. Some experts will give you a lot of concessions if you treat them lightly and with an agreeable tone.

If you cannot make it to court to observe trials, find trial transcripts to read and study. You will miss the tone and the timing, but you will be able to see how attorneys question certain types of witnesses. Over time, you will start to see the patterns and methods that you can start using for yourself.

So how can you implement these techniques? The first step is by learning the methods, and the second is to learn how to do them for yourself. When I was starting out, this was the toughest part to really grasp. I was so focused on getting the questions right and what exhibits I needed to go through with the witness that I would often forget to just follow the line of questioning as it happened live and to just let myself relax into the flow. It doesn't happen overnight, but with time and practice, you can develop your skills.

Use focus groups

Focus groups are a relatively low-stakes method to practice your material in front of a live audience. Our firm routinely does three to five focus groups in the month leading up to a trial in order to really narrow down the issues and learn how to convey the client's story to the jury. While you can certainly engage a service to assist you in setting up and conducting a focus group, it is also possible to handle on your own in order to keep costs down.

Use websites like www.craigslist.com to recruit persons for your focus group, and use your own conference room as

opposed to a formal mock-trial courtroom (or ask a friend or even the CAALA List Serve if you need to rent out a space) for a few hours during a weekday to conduct the event. Do not try to put on an entire trial at once; rather, use your time to practice your opening or examination of a witness, and to get feedback from the mock jurors on what worked and what did not work.

One word of advice regarding focus groups: You want your focus groupers to be brutally honest about your case and also your delivery. Do not feel bad if the participants have harsh things to say about you, especially at first! This is how you can learn the “danger points” of your case and how to address them, so that by the time you get in front of the real jury, not only will you feel more comfortable with how you question witnesses, but you will also know how to diffuse each and every defense that comes your way.

During the mock deliberations, I have been called a “bulldog” and much worse. I used to take offense to these terms and still do not particularly enjoy being compared to a dog (I also did not enjoy being called a “b*tch” by focus groupers who did not enjoy how I aggressively cross-examined a witness, and wondered if other, male attorneys might have received the same labels if engaged in the same conduct).

I have come to understand that the energy I was bringing was not appreciated by the jurors in that moment and the same could be true in the courtroom – and now I know that I have to measure how I bring out that energy and save it for the right witnesses. There is definitely a time and a place where a level of aggression is fully acceptable so long as you always remain respectful of the Court and the environment you are in. As a smaller-statured woman, I also think the element of surprise is also on my side since it might not appear at first glance that I will react in that way, but it can really be effective.

If you cannot afford the time or expense of a full focus group, practice in front of anyone who will listen to you.

Treat your staff to an office lunch and practice while you eat; have a friend listen over Zoom while you try out a line of questioning; do the same with family members or significant others. On the way into court, I sometimes run through question patterns out loud in my car.

By just drilling down the topics, and the ways you want to introduce the questions to the witness, you’ll find the flow will get much easier. The goal is not to memorize your questions, as spontaneity and active listening sometimes bring you down different lines of questioning than you may have originally planned. However, you will know what subjects you need to hit with your witness and can start thinking about how to work on your delivery to really pack a punch at the right times.

Adaptability and improvisation

You should have all of your witness outlines prepared well in advance of trial. These outlines can help you figure out the overarching themes and stories you are presenting to the jury and will keep you organized during your questioning. Keep practicing your outlines, but be ready to change it all up at a moment’s notice. As much as we plan for every outcome at trial, we have to be ready for any challenge that comes our way, and this requires a degree of adaptability and improvisation, because nothing ever goes exactly as planned at trial.

In 2022, I was involved in a dog-bite trial where the main eyewitnesses to the incident were 18-year-old college students. I had planned to hit certain points with each of the women but not to draw it out. With the first witnesses, I was firm but polite, but even so I was concerned that the jury would find me to be too overbearing given the age difference and the fact that at the time of the incident, the witnesses had been in middle school.

Then the defendants’ daughter was called to the stand. Unlike the other witnesses, she was small for her age and looked five years younger than she was. I knew I couldn’t ask her many questions

at all. Dan Kramer, who was trying this case with me, just gave me a look and whispered, “Ask her one question and sit down,” so I did. Rather than going through my outline, which had questions about the dog, the positions of all the witnesses at the time the bite happened, and the appearance of the wound, I stood up, smiled, asked her a single, inconsequential question, and sat down. I kept my voice light and my demeanor relaxed.

The exact opposite scenario happened in another trial in 2022. Our co-counsel was set to examine the defendant driver in a car-versus-pedestrian case. The driver was an older woman who looked so friendly and kind that we did not want our co-counsel to look like a bully at all when he cross-examined her. We kept telling him, “pretend she’s your grandma” so that he wouldn’t go too hard on her, even though we had several points that needed to be made about how the impact occurred and the defense stance on liability.

Halfway through his questioning, however, she said something about her thoughts on our client’s responsibility for the crash. In that moment, we knew that our co-counsel could really bring the thunder, and he did. He turned up the tone of his questioning, never disrespectful or too aggressive, but adding in more of an incredulous tone to reflect on some of the ridiculous theories she offered, and by holding her to answering each question a little more firmly than he had before. The jury could feel it, and with that, we knew that we had them.

These same principles apply to how you approach your lay witnesses as well as expert witnesses. What I have found to work well for myself is to question each witness with calm confidence, even if I am really nervous on the inside, and to carefully bring out firmness in tone and questioning when I need it. Practicing helps me know what points I need to make, but I also try to stay in the moment so that I don’t lose the flow. It really is true that 80% of your nerves are not visible to other people.

There is no magic formula for learning your own style. Some of it comes with time and experience, but everyone has to start at the beginning. Don't be afraid to experiment with different styles and themes as you work through a case until you land on what works for you. One of the best parts of our profession is how we can all continually learn, no

matter how far along we are in our practices. As plaintiffs' attorneys, we have a wonderful network of colleagues who only want to see the others succeed and will without hesitation help out however they can. And remember, if I, who at five years old refused to perform at a dance recital and asked to transfer to a different elementary school so I didn't have to

perform in the fifth-grade play, can get in front of a jury and question witnesses, so can you.

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