

DO YOU SOLEMNLY SWEAR . . .
Appearing as a Witness in a Civil Case

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— David W. Holman¹

I. Introduction: The Pursuit of the Truth

The purpose of the presentation of evidence at trial is to assist in the search for truth. For, only if a trial is based on truth, is there justice. Thus, the role of the witness at trial is not just to aid the lawyers or to help “win” the case, but to aid the judge, the jury and, indeed, the entire civil justice system in the pursuit of truth.

This paper provides tips for appearing as a witness in the trial of a civil case, with an overview of the trial process. By understanding the trial process, one can better understand the role of the witness in that process.

Although the role of a witness at trial is important, that role has diminished as the number of civil trials has diminished. The paper begins with an examination of the question “will there be a trial?,” and a discussion of the various obstacles that stand in the way of trial. The paper then explores the pretrial processes, or how the case gets to trial. The paper then explores the mechanics of trial, to give the reader a blueprint for how the main elements of the trial work together. Finally, the paper reaches the heart of the topic—an examination of witness testimony at trial and a comprehensive list of do’s and don’ts for appearing as a witness at trial.

The paper discusses trial under Texas state rules (the Texas Rules of Civil Procedure), unless otherwise noted.

II. Will There Be A Trial?

Because this paper is on appearing as a witness at a civil trial, it seems appropriate to briefly address the decreasing number of civil trials in the United States. Although there has been a lot of publicity about “runaway juries” and “windfall verdicts,” in reality, most cases never get to trial.

Professor Mark Galanter of the University of Wisconsin Law School conducted a long term study of cases filed in federal courts over the last forty years. The results of the study amazed some. Whereas in 1962, some 11.5 percent of cases filed got to trial, in 2002, only 1.8 percent went to trial. Those results are mirrored in Texas state courts, which have seen a 20 percent decrease in jury trials in the past 30 years.

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There are a host of reasons for this development, some practical, some political, some procedural. For informational purposes, some of those reasons are discussed below.

A. Solvent defendants

If the defendants are insolvent, no lawyer worth his salt would take the case to trial. Thus, unless the defendants are solvent, the case will not be tried.

B. Solvent plaintiffs

There also needs to be solvency on the plaintiff's side, either from the client or from the plaintiff's attorney. The trial of a case, in this day and age, is a very expensive proposition. If the plaintiffs or their attorney cannot afford the costs of trial, the case cannot be tried.

C. Arbitration

For those who believe in the jury trial as one of the protectors of freedom in our democracy (as I do), one of the most disturbing trends is the recent onslaught of arbitration as an "alternative dispute resolution"(ADR) procedure. Courts will enforce an arbitration clause in a contract, which provides a potential defendant with an easy way to avoid a jury trial. It is difficult to find a consumer contract nowadays that does not require arbitration. Unfortunately, those who cried the loudest for arbitration now realize that it is not a very happy alternative to jury trials. The arbitrators are not bound by the rules that have been developed in our courts over hundreds of years to protect justice. And, if the arbitrators get it wrong, there is often no recourse—such as appellate review. Finally, most have learned, to their chagrin, that arbitration does not save either time or money. Arbitration is often a lengthy and costly process, one in which the arbitrators, who are getting paid by the hour, have an incentive to drag out.

D. Mediation

Another ADR procedure which judges frequently use is court-ordered mediation. If successful, this procedure obviates the need for trial.

E. Special appearance

A defendant with no contacts with the forum can avoid a trial by filing a special appearance, saying that the forum should not have jurisdiction over him or her. If the special appearance is granted, the case cannot be tried in that forum, but must be tried where the defendant does have contacts—usually the state of the defendant's residence.

F. Interlocutory appeal

Texas rules provide a statutory procedure in certain cases for an interlocutory appeal—which means an appeal in the middle of the litigation. If this interlocutory appeal is successful, the appellant can sometimes avoid trial.

G. Settlement

Most cases settle and are not tried.

H. Meritorious

If a case is frivolous, the judge can dismiss it.

I. Summary judgment

The primary legal way to avoid trial is to ask the judge to grant a summary judgment—which means that there is no need for trial because the party has established their right to judgment as a matter of law. The burden on the movant is to conclusively establish that there are no genuine issues of material fact and that the movant is entitled to judgment as a matter of law.

1. Plaintiff's claims

Usually, motions for summary judgment are filed by the defendant who asserts that the plaintiff cannot prove his theory of liability because of some legal or factual impediment. However, more rarely, a plaintiff will move for summary judgment and assert that there is no right to trial because his claims are conclusively established as a matter of law.

2. Defendant's defenses

The defendant can not only move for summary judgment on the plaintiff's claims, but also on the defendant's so-called "affirmative defenses." An affirmative defense is one that says, in effect, that even if everything the plaintiff says is true, the plaintiff still cannot recover because of defense X. The best illustration of this is the statute of limitations. In Texas, the statute of limitations for fraud is four years. Plaintiff files his petition for fraud against the defendant. Defendant files a motion for summary judgment and says, hey, I may have defrauded you, but you knew that five years ago, and because you delayed too long in filing your lawsuit, you cannot recover against me.

This can work the other way too. That is, a plaintiff can file a motion for partial summary judgment and contend that the defendant cannot recover on one or more of its affirmative defenses because of some legal or factual problem.

III. Getting to Trial

In proceeding to trial, there are certain events that take place during the pretrial process that will be significant at trial—such as pleadings, discovery and motion practice.

A. Pleadings

The evidence, the questions to the jury, and the judgment of the court, among other things, must all conform to the pleadings in the case. That means that the pleadings become a central focus on which the entire case is framed.

1. Plaintiff's petition

The first important pleading that is filed—the one that starts the lawsuit—is the plaintiff's petition, called the “complaint” in federal court. The petition states the names of the defendants, where they may be served with process, the facts on which the complaint is based, the theories of liability asserted and the relief sought. The plaintiff may assert alternative grounds for relief.

2. Defendant's answer

Once served with suit papers, the defendant is required to file a written answer. In state court, this usually consists of a general denial—which, as it implies, generally denies everything that the plaintiff says—together with any affirmative defenses and other challenges to the plaintiff's petition.

3. Third party petition

The defendant can also file a third party petition, which is a method to bring in other parties not named by the plaintiff. The defendant would do this in an effort to shift both the blame and the burden of loss to the other party. This becomes like a new petition—the defendant becomes the third party plaintiff and the third party defendant must file an answer.

4. Cross-claims and counterclaims

The parties can also file claims against each other. If the defendant files claims against the plaintiff, those are called counterclaims. If a party files a claim against another

party to the suit, such as a defendant filing a claim against another defendant, or a plaintiff filing a claim against another plaintiff, those claims are called cross-claims.

5. Special exceptions/Failure to state a claim

The plaintiff’s petition must give “fair notice” of his or her claim. If the plaintiff’s petition fails to clearly state a claim, the defendant can move for a clearer explanation of the claim. In Texas, this is called special exceptions; in federal court, it is called a motion for a more definite statement. If the special exceptions are granted, the trial judge will order the plaintiff to replead. For example, the plaintiff may not have stated how much he seeks in damages. Special exceptions may require the plaintiff to file an amended petition which asks for a definite sum.

B. Discovery

Much of the pretrial process is taken up with discovery—the process of discovering the truth (or lack thereof) behind plaintiff’s allegations. In this section, we will discuss the procedure in Texas state district courts. Federal courts have similar, but different, procedures.

1. Scope of discovery

The key to discovery is relevance. One is entitled to discover all non-privileged information that is relevant to the subject matter of the litigation. One cannot object that the information is not admissible at trial, if the information sought “appears reasonably calculated to lead to the discovery of admissible evidence.” TEX. R. CIV. P. 192.3(a). The following things are specifically authorized as discoverable under Texas practice.

a. Documents and tangible things

Documents can include, among other things, papers, books, charts, photographs, recordings, email—almost any transcription of information in some way or other. Tangible things can be everything from the automobile involved in the accident to a cell phone.

b. Persons with knowledge of relevant facts

The names, addresses and phone numbers of all persons with knowledge of relevant facts must be disclosed.

c. Trial witnesses

The names, addresses and phone numbers of all persons expected to be called as a witness at trial must be disclosed.

d. Testifying and consulting experts

Because experts play such an important role at trial, the rules allow a party to obtain a lot of information in discovery about the other side's expert, including name, address, phone number, subject matter of testimony, opinions held, documents reviewed, and so forth. A party does not have to disclose the identity or opinions of a "consulting expert," unless the party's "testifying expert" has reviewed the "mental impressions and opinions" of the consulting expert.

e. Indemnity and insuring agreements

A party may obtain discovery of all relevant insurance policies and indemnity agreements.

f. Settlement agreements

A party may obtain discovery of all relevant settlement agreements. In most cases, the non-settling defendant is entitled to a credit or offset for any settlements that the plaintiff has entered into with potentially liable people or entities, even if those people or entities were not sued.

g. Witness statements

Any recorded statement by a witness or any written statement that is signed or adopted by a witness is discoverable.

h. Potential parties

Each party must disclose the names of other potential parties to the litigation.

I. Contentions

Upon proper request, a party must disclose all legal contentions and the factual basis for those legal contentions.

2. Forms of discovery

Texas allows the following forms of discovery.

a. Requests for disclosure

In an effort to cut through the rigamarole of discovery, the rules were amended in 1999 to require all persons involved in litigation, upon proper request, to produce most of the information listed above under scope of discovery very early in the process.

b. Requests for production and inspection of documents and things

A party can request the other side to produce all relevant documents and things. If the item is a thing, the thing can be produced for inspection—such as the defective tire.

c. Requests for entry upon and inspection of land

A party can also be requested to allow entry upon land for inspection relevant to the lawsuit. For example, the opposing party can be permitted to visit the job site where the accident occurred.

d. Interrogatories to a party

The most common form of discovery is interrogatories—which are questions asked by one party of another. The questions must be answered under oath by the party—not by an agent or an attorney. Thus, the answers can be used against that party at trial.

e. Requests for admission

These are exactly what they say, but they have an even more important function. The purpose of requests for admission is to narrow the issues for trial. Thus, one party can ask the other party to admit to almost anything, including ridiculous questions like “do you admit I was not negligent?” or “do you admit that you have no damages?” If a party fails to timely answer the requests, the questions can be *deemed* admitted, which could result in admitting one’s entire case away. The admissions can be used against the party at trial.

f. Oral or written depositions

The other main weapon in the discovery arsenal is the oral deposition. There is a form of discovery called the written deposition, which is a deposition on written questions, but it is not often used except for custodians of records. The oral deposition, on the other hand, is

the primary way that a lawyer determines what information is possessed by a witness. The deposition is transcribed—either by video recording or written transcription by a court reporter, or both—and is frequently used at trial as a form of impeachment of a witness. The deposition can also be read at trial in certain circumstances.

g. Motions for physical or mental examination

A little used form of discovery is the motion to require the physical or mental examination of someone—usually the plaintiff. As one may imagine, because of the intrusive nature of such an examination, the burden on the movant is quite high.

3. Protection from discovery

Because discovery can be very burdensome, the rules permit a person protection from discovery in the proper case. For example, a discovery request may seek production of one’s tax returns, and the non-movant may seek a protective order to prevent disclosure of those returns because of invasion of privacy.

4. Assertion of privilege

There are also certain types of information that are shielded from discovery by privilege, such as the attorney-client privilege, the husband-wife privilege, the clergy-penitent privilege, and the privilege against self incrimination, among others. When properly asserted, the privilege is an absolute bar to production of information.

C. Motion practice

In addition to pleadings and discovery, the pretrial process can involve a lot of motion practice, which may or may not be important to what occurs as trial. Examples of such motions include motions to transfer, motions to abate, motions to compel responses to discovery, motions for sanctions, and so forth.

IV. Trial Process

In order to understand the role of the witness in the trial process, it is important to understand that process. What follows is the barest skeleton of the civil trial.

A. Types of trials

1. Bench trial

A trial to the judge alone, without a jury, is referred to as a bench trial. The judge still hears evidence from witnesses, but the rules are a lot more lax with regard to what evidence will be admitted or excluded—the theory being that the judge will not consider what evidence is improper.

2. Jury trial

If one party has made a request and paid the fee (i.e. for Harris County the fee is \$30 in district court, \$22 in county court), that case will be tried to a jury. In civil cases, the verdict must be agreed to by at least 10 out of the 12 jurors in district court, or at least 5 out of the 6 jurors in county court. The verdict must be unanimous if it concerns punitive damages.

3. Federal vs. state court

Federal district courts use 6 person juries instead of 12 person juries used in state district court.

B. Pretrial conference

The judge will convene a pretrial conference, usually during the week or days prior to trial, to take care of “housekeeping” matters, such as unresolved issues of fact or law. The following are matters typically addressed at such conference.

1. Motion in limine

A motion in limine is a motion filed before trial in an attempt to exclude inadmissible or prejudicial evidence. The judge’s ruling on a motion in limine is merely preliminary—the parties must still make the objections to the evidence at trial and get a ruling. But the judge’s grant of a motion in limine requires a party to approach the bench, outside of the hearing of the jury, to seek to admit the excluded evidence.

2. Expert reliability

In Texas, as in most state and federal courts, an expert witness must not only be qualified, but his or her testimony must also be reliable. Typically, there are pretrial hearings—called Daubert or Robinson hearings, after the cases that adopted the rule—in which the judge hears challenges to the expert and determines whether the expert’s testimony

is reliable enough to go to the jury. For example, if a scientific expert relies on “junk science”—science that is not based on peer-reviewed clinical trials—that expert’s scientific opinion will not be permitted before the jury.

3. Exhibits

Usually prior to the pretrial conference, the parties will exchange the exhibits that they will rely on in trial, for the purpose of determining which of those exhibits is objectionable. At the pretrial conference, the judge will rule on those objections.

4. Deposition excerpts

When a deposition is taken, there is usually no judge present. Thus, the parties make objections, but the ruling on those objections is reserved for the judge. At the pretrial conference, the judge rules on objections to the deposition excerpts that the parties intend to present before the jury.

5. Jury charge

Another item the judge may want to discuss at the pretrial conference is the proposed jury charge. The jury charge is the document given to the jury at the end of the trial that contains the questions that they are to answer. This is the “court’s charge,” since it contains the law as submitted by the court to the jury, but the charge is usually prepared by the parties. Each counsel for a party prepares his version of the proposed charge and submits it to the judge and opposing counsel. The judge may require the proposed jury charge to be exchanged and a preliminary discussion held at the pretrial conference. The final conference and objections on the charge usually is held at the end of the case, prior to submission of the case to the jury.

C. Jury selection

1. The venire

The jury is picked from a jury pool, or venire, assembled by the court. The number of potential jurors in that venire is up to the discretion of the judge.

2. Voir dire

In Texas, each lawyer is permitted to question the jurors about the case in a period known as “voir dire,” from the French term for “to speak the truth.” The purpose of voir dire is to determine the impartiality or suitability of the potential juror. In federal courts, the judge typically asks the questions, instead of the lawyers.

3. Challenges for cause

Any lawyer may challenge a potential juror as disqualified or unfit for jury service. The law imposes certain preliminary qualifications on a juror (that he or she be 18, be a citizen, be of sound mind, be able to read, not be convicted of a felony, and so forth), plus a jury must not have an interest or a bias in the case. If such a disqualification is found, the judge may dismiss the potential juror from the venire.

4. Peremptory strikes

In addition to challenges for cause, a lawyer may exercise a peremptory strike, which may be any exercised for any reason (except for a racially discriminatory reason). By this way, the lawyer may try to keep off the jury those who he believes would not be favorable to his client's position. In a typical civil case, each party will be given 6 peremptory strikes. After the judge dismisses certain jurors for cause, and applies the parties' strikes, the first 12 remaining jurors will comprise the jury panel.

D. Opening statements

Each lawyer is permitted to make an opening statement, to tell the jury what the lawyer believes that the evidence will show. The plaintiff's lawyer is permitted to present opening statement first, because the plaintiff has the burden of proof. Although lawyers try to make it so, this presentation is not supposed to be argumentative.

E. Presentation of evidence

After the opening statements, the plaintiff's lawyer begins presentation of the plaintiff's case to the jury. Once the plaintiff rests, the defense will present its case to the jury. Once the defense rests, the plaintiff may be permitted to present rebuttal evidence. Following the presentation of evidence, the case is submitted to the jury.

1. Testimony

Most evidence is presented through the testimony of a witness, who may either provide direct evidence, circumstantial evidence or opinion evidence. The trial judge may limit the number of witnesses.

2. Documents

The other way to present evidence is through "documents"—although at present, documents can mean a number of different things. Documents can be as simple as a contract or as complex as electronic metadata concerning email transmissions. The documents, which

become exhibits at trial, are usually proven up through a witness and are used to impeach a witness.

3. Discovery responses

A party's discovery responses may also become evidence that can be used against that party.

4. Depositions

Depositions are sometimes read or played to the jury in lieu of witness testimony or as a means of impeaching a witness.

F. Admission and exclusion of evidence

Throughout the trial, the judge makes rulings on the admission or exclusion of evidence. The judge has broad discretion in making such rulings, and the judge's decision cannot be overturned on appeal unless the judge has committed a clear abuse of discretion.

1. Objection

To preserve error in the admission or exclusion of evidence, the lawyer must make a timely or specific objection to the evidence. If, for example, the lawyer waits until the next day, or fails to specify why the evidence is objectionable, then the objection is waived.

2. Ruling

To preserve error, the lawyer must also ensure that the judge actually rules on the objection on the record. If the judge says, "Move on, counsel," that is not a ruling. Also, if the judge makes his ruling in chambers, without a court reporter present, that is not a ruling that can be relied upon on appeal.

3. Offers of proof

If the judge excludes evidence, the lawyer needs to prepare an offer of proof—which can be a question and answer of a witness or a short narrative summation of the evidence—so that the appellate court knows what evidence the lawyer would have submitted if the lawyer had been permitted to do so.

G. Motions for directed verdict

At the conclusion of the plaintiff's case, the defendant's counsel will typically present a motion for directed verdict, which says that the plaintiff has not proven its case. If the judge agrees, the case is over. If the judge disagrees, the defense presents its case. At the end of the defense case, the defendant's lawyer may reurge the motion for directed verdict. If the judge agrees, the judge rules on the case as a matter of law and does not submit the case to the jury. The judge may also grant a partial motion for directed verdict, in which the court rules against one or more of the plaintiff's theories of recovery. In rare cases, the plaintiff can submit a motion for directed verdict, arguing that the defendant has not proven its defense and that the plaintiff is entitled to judgment as a matter of law. Motions for directed verdict are rarely granted because under the proper standard of review, if there is any probative evidence, the trial court must submit the issue to the jury.

H. Jury charge

Once the court decides how the questions and instructions will be submitted to the jury, the "court's charge" is prepared. The lawyers are given an opportunity to object on the record to the court's charge. Prior to closing argument, the court's charge is read to the jury.

I. Closing arguments

The lawyer for each party is entitled to present a closing argument. The plaintiff's lawyer goes first because the plaintiff has the burden of proof. Then the defendant's lawyer responds, then the plaintiff's lawyer may conclude with a rebuttal argument.

J. Verdict

After the jury deliberates, it answers the questions submitted to it in the court's charge, which answers become the jury's verdict.

K. Judgment

Following reception and acceptance by the judge of the jury's verdict, the jury is discharged. Then the judge must decide whether to enter judgment on the jury's verdict. The verdict victor typically presents the judge with a proposed form of the judgment. Once judgment is entered, the judgment loser usually files post-judgment motions challenging the judgment—such as a motion for new trial, a motion for judgment notwithstanding the verdict, or a judgment to correct, modify or reform the judgment. After the judge rules on those motions, the judgment loser may file a notice of appeal to appeal from the judgment.

L. Appeal

In civil cases, appeal first goes to the intermediate appellate court in that region. There are fourteen intermediate appellate courts in Texas, two of which are in Houston. Every litigant has the right to have the case reviewed on appeal to the intermediate appellate court. After the court of appeals issues its opinion, the party may ask the Supreme Court of Texas to decide the case, by filing a petition for review. The Supreme Court is not required to hear the case and only takes appeals that are important to the jurisprudence of the entire state of Texas. Thus, fewer than ten percent of the cases filed in the Supreme Court are heard by the Supreme Court.

V. Trial Testimony

After this long journey through the trial process in Texas, we have finally arrived at our destination—appearing as a witness in a civil case. We will first review the types of witnesses and types of examinations of witnesses at trial, and then we will present certain do's and don'ts for appearing as a witness.

A. Types of witnesses

1. Fact witness

A fact witness is a person with personal knowledge of relevant facts. If the person does not have personal knowledge—"I heard it from my grandma"—then that person is usually not qualified to testify. Most cases are presented through the testimony of witnesses who know the facts of the case.

2. Lay opinion witness

Some fact witnesses may also be permitted to give their opinion about some fact or issue in the case. Those so-called "lay opinions" are limited to opinions based on the perception of the witness ("he looked intoxicated to me") or opinions that are helpful to a clear understanding of the witnesses testimony or a determination of a fact in issue ("yes, these are the reasonable costs to repair a car in Harris County, Texas.").

3. Expert witness

Some cases require expert testimony to assist the jury to understand scientific, technical or other specialized knowledge. For example, a plaintiff cannot prevail in a medical malpractice case against a doctor without presenting expert evidence from another doctor that the defendant's conduct fell below the standard of care.

a. Qualification

To testify as an expert, the witness must be shown to have knowledge, skill, experience, training or education suitable to assist the jury in understanding the evidence. If the witness is not shown to be so qualified, the witness should not be permitted to testify.

If you are going to appear as an expert witness, the lawyer relying on your testimony will usually present your curriculum vitae to prove your qualifications. Even if the other side agrees that you are qualified to testify as an expert, your lawyer may ask you to describe your many achievements in order to bolster the credibility of your opinions before the jury.

If the other side questions whether you are qualified, that lawyer may ask to take you on “voir dire” (which, of course, is different from the voir dire questions asked of the potential jurors). The purpose of this voir dire is to establish through questions and answers that you are not qualified. If so challenged, the trial judge will rule on whether you are qualified to give expert testimony.

b. Reliability

Even if qualified, an expert witness’s opinion testimony must still be shown to be reliable. Thus, an expert usually cannot rely on an outmoded or experimental study to provide expert testimony to the jury. Typically, the trial judge will make a preliminary determination as to whether the expert’s opinion testimony is reliable prior to trial at the so-called *Daubert* or *Robinson* hearings.

c. Evidence relied upon

The expert may rely upon evidence typically relied upon by experts in that field, even if such evidence would not be admissible at trial. For example, a car design expert may rely on customer complaints although such hearsay would not be admissible at trial.

B. Types of witness examinations

1. Distinction between deposition and trial testimony

The purpose of deposition testimony is usually to discover information. However, the trial occurs after the information has been discovered. Thus, the purpose of trial testimony is not to discover information, but to prove a position to the jury. Thus, trial testimony is usually more focused and direct than a deposition.

2. Direct examination

The party that calls the witness will examine the witness in a direct examination. This is usually in a series of questions and answers to present the evidence known to that witness.

3. Cross-examination

Once the direct examination is concluded, the lawyer for the other side is permitted to cross-examine the witness. This is an effort to challenge or impeach the evidence presented by the witness on direct examination. Anything that impacts on the credibility of the witness's testimony is generally fair game in such cross-examination.

4. Redirect and recross examination

Following cross-examination, the lawyer presenting the witness may do redirect examination in an effort to rehabilitate the witness and answer the challenges that the other side posed to the witness. Then, the other side may do recross, back and forth, for so long as permitted by the trial court.

5. Leading questions

The party who presents the witness is not permitted to ask leading questions, unless that witness is considered an adverse witness. However, cross-examination is ordinarily done through leading questions.

6. Hypothetical questions

Opinion experts can be asked hypothetical questions, but such hypotheticals cannot be too speculative or far removed from the facts of the case. If you are asked a hypothetical, you must be very careful to understand each premise of the hypothetical, lest you inadvertently concede an answer you would not concede to normally.

7. Non-responsive answers

A witness must respond to the question asked. If a witness begins to foray into a narrative answer or not answer the question directly, the other lawyer can object to the witness's testimony as non-responsive. The judge may instruct the witness to just answer the questions that are asked.

C. The Rule

In most civil trials, one side will request that the witnesses be placed under “The Rule.” If the Rule is granted, it means that witnesses may not sit through the trial, but must sit outside and not discuss the case with anyone else until they are called as a witness at trial. Exceptions to the Rule include the party’s expert and the party itself or its corporate representative.

D. The Oath

Each witness is asked to swear or affirm to the truth of the testimony that witness is about to give. If the testimony is false, the witness is subject to the penalties of perjury.

VII. Do’s and Don’ts of Trial Testimony

Here are the tips for appearing as a witness in a civil case. Of course, these are but general suggestions and you should consult with the lawyer that is going to present you for his or her advice about your testimony.

A. Do be prepared

The Boy Scout motto applies to witness testimony. The other side will try to shake your testimony with prior statements or testimony you have given, comments made by you or others in documents, and so forth. To be ready for your testimony, you must review all relevant documents and prior testimony.

B. Do listen carefully

Lawyers often try to trip up a witness with a complex or difficult question. Your job is not to help the lawyer out. You must listen carefully to the question and only answer the question asked. If you do not understand the question, you should tell the lawyer that you do not understand the question, then wait to answer until the question has been asked in a way that is understandable. Witnesses often get in trouble by answering the question that has not been asked.

C. Don’t look to the lawyer for help

Although you may have consulted with a lawyer outside of the presence of a jury, the testimony that is being given is your testimony, not the lawyers. If, when presented with a difficult question, you look to your lawyer for help, you will lose all credibility in the eyes of the jury.

D. Don't argue with the lawyer

If you are argumentative, aggressive or defensive, the jury will question your confidence in your position. Much better to remain calm and confident.

E. Don't lose your temper

To shake a witness's confidence in his position, and to make that witness appear less trustworthy before the jury, some lawyers will try to force a witness to lose his or her temper before the jury. Resist this. Understand that it is the lawyer's job to try to get under your skin. Do not let him do so.

F. Don't be cute

The matters presented at trial are very serious matters to the parties involved. There is a time for humor. Appearing as a witness in court is not a time for humor. Your job is to present your fact or opinion evidence to the jury. That is your only job. You are not there to entertain counsel, the judge or the jury. Often, humor falls flat, and the witness appears like a buffoon, like a smart aleck, or like someone who does not believe seriously in the position.

G. Do be courteous

To be believed and liked, you should be courteous to everyone in the courtroom—from the judge to the lawyers to the lowliest clerk—even if they are not courteous to you.

H. Do dress the part

As a witness, you are there for a serious reason and you must dress the part. Even if you have been given the day off to testify, you should not appear in a tee shirt or halter top and jeans. Dress as if you are going to church.

I. Do admit you talked to the lawyer on your side

You will probably be asked if you talked to the lawyer on your side. Admit this. It is okay to talk to the lawyer on your side. You would probably be a fool not to talk to the lawyer on your side.

J. Do not mention insurance

Even if insurance is relevant to a matter, do not mention insurance unless you are specifically asked about it. Sometimes, the mere mention of insurance is enough to cause a mistrial.

K. Do tell the lawyer on your side all the facts

Witnesses get in trouble when they do not tell the lawyer all the facts—not only facts concerning the events involved in the case, but also facts that may be used to attack your credibility. For example, if there are adverse documents or prior correspondence that might be used against you, bring this to the attention of the lawyer on your side. If he knows about it, he can discuss it with you during direct examination. However, if he does not know about it, you can be sure that the other side’s lawyer will bring it up and attack you with it. This suggestion also applies with regard to items in your past that could be used against you, such as prior criminal convictions, prior statements, prior testimony, and so forth.

L. Don’t give more than the answer

Just answer the question. You are not there to decide how the jury will use such answers or to try to help out one side or the other. Your only job is to truthfully answer the questions asked of you.

M. Don’t guess

Speculative evidence is no evidence at all. If the lawyer asked you to guess about something, do not fall into that trap. Simply say, “I don’t know, it would only be a guess on my part.”

N. Don’t exaggerate

Sometimes to bolster testimony, a witness may feel the need to bolster that testimony by exaggeration. Resist that temptation. An exaggerated truth, when exposed, is seen by the jury as a lie.

O. Don’t characterize your testimony

To bolster testimony, a witness may attempt to characterize the testimony, as “If I’m being honest . . .” or “honestly” or “in all candor . . .” Resist that temptation. If you have to stop and point out where you are being honest, it appears that you have not been completely honest on other occasions.

P. Do review the document before commenting on it

The typical lawyer tactic is to use a document to impeach you. The lawyer may say, “Didn’t you say something completely different in the quarterly report?” Your response should be, “I don’t know, can I see the quarterly report?” Once you review that document in

the context of the lawyer's questions, you will be able to answer the lawyer's questions without being off guard.

Q. Do ask to see your deposition testimony before commenting

A lawyer may also seek to impeach your testimony with your prior deposition testimony. Sometimes in this process, just to make you appear equivocal to the jury, the lawyer may mischaracterize your answers. Don't let the lawyer do this. If the lawyer says, "Didn't you say something completely different in your deposition?" Your response is, "I don't know, can I review my deposition." Once you review your deposition in context, you will know how to answer the lawyer's questions.

R. Don't rehearse answers

If you are properly prepared, you will know exactly what questions will be asked of you. There is a tendency for witnesses to feel that they must have a good performance, and that they must rehearse or have pat answers to the anticipated questions. Do not rehearse or memorize your testimony. Such testimony is not believable to the jury.

S. Don't be afraid to say "I don't know"

Often the best answer to a question is "I don't know." That answer is far better than trying to guess, speculate, or divine what the answer might be.

T. Do correct any mistakes as soon as possible

In the anxiety of appearing as a witness under oath in the solemnity and ceremony of a civil trial, sometimes a witness will make a mistake in his or her testimony. That is okay, we all do it. However, once the witness realizes the mistake, the best thing the witness can do is to correct that mistake. Rather than adversely affecting the witness's credibility, the admission will come across as honesty.

U. Don't let the lawyer lead you down the primrose path

The other side's lawyer's job is to lead you down the primrose path to force you to admit to something you would not agree to normally. This is usually done through a series of leading questions to which you can only answer "Yes." Then, he says, "Well, if all that's true, then won't you admit that x is true?" There are two things you need to watch out for here. First, be careful how you answer each premise. Although the question appears to lead only to a "yes" answer, there may be exceptions. You are entitled to be as complete in your answer as possible. The second thing you need to watch out for is your answer to the final question. Let's say again that the final question on the primrose path is "Well, if all that's

true, then won't you admit that x is true?," the tendency is to answer: "Well, yes, but . . ." Such an answer makes the witness appear as if he is trying to avoid an obvious conclusion. The better answer to that question is a simple "No." You do not need to explain. The lawyer may ask you to explain, in which case you can explain that maybe that is true in some situations, but it is not true in all situations, and if you changed the facts, or added some facts—such as in the present case—it would not be true. If the questioning lawyer does not ask you to explain, you have just given the lawyer on your side a cue to ask you to explain when it is his turn to question you.

V. Do behave yourself while in the courthouse

As a witness, in the courthouse, you are under continual scrutiny by the jury. If the jury sees you involved in horseplay or anything else that impacts on your credibility, the jury will not like you or believe you when you get on the stand. Therefore, behave yourself at all times while in the courthouse.

W. Do look at the jury

You are appearing as a witness to provide evidence to the jury. Thus, you should look at the jurors, not the lawyers or the judge, when you are answering the questions. Looking the jurors in the eyes helps to reinforce the credibility of your testimony.

X. Don't fill in moments of silence

Silence is golden. Some folks feel the need to fill in pauses in conversation. Resist that urge. A witness gets into trouble if that witness attempts to do more than merely answer the question asked.

Y. Do keep hands away from face and mouth

A witness who fidgets or puts their hands near their face or mouth appears uncomfortable with their testimony. Try to remain still and confident.

Z. Do lean forward

A witness who leans forward is engaged in the questioning process. One who slouches or leans back appears to the jury to be disengaged in the process.

AA. Do use language the jury can understand

Sometimes witnesses, typically experts, speak in a jargon reserved to their field of endeavor and do not know, or care, that the jury does not speak that language. To be understood, the witness should speak in a language that the jury can understand. To help the jury understand complex technical mumbo jumbo, it is helpful to provide commonplace examples or analogies.