



# SUGGESTIONS TO TRIAL WITNESSES

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## YOU SHOULD KNOW...

1. You may be called to testify in court in response to subpoenas for records or as a witness to events. Here are some practical hints and suggestions on what to do and how to do it well when you are asked to serve as a witness.
2. If you are going to testify concerning records, become familiar with them. You should know what the records contain and be able to refer to them easily if you must do so while you are on the witness stand. If you are not generally familiar with your company's procedures for making and keeping these records, find out. You may be asked to authenticate them as records made and kept in the regular course of the company's business.
3. If you are going to testify concerning some event that happened months, or even years before, try to refresh your recollection. Return at least once to the place where the event occurred. Close your eyes and try to picture the exact scene; note the location of physical objects and approximate distances, for you may be asked about these things. If you gave a written statement, ask to see it. Talking with friends or co-workers who were there may help to recall details that you had forgotten. But do not try to develop a common story. Remember: your testimony must state what you recall, not what somebody else told you.

## YOUR CONDUCT...

### BEFORE GIVING TESTIMONY...

1. Dress neatly, but do not overdress. Your normal business attire is probably about right.
2. If you have received a subpoena, take it with you. It may prove useful, for example, if you are not sure in which courtroom the trial is being held.
3. When you arrive outside the courtroom, if you do not know the attorney who has subpoenaed you, ask for him and introduce yourself. If the trial is in progress and you must wait for a recess, it is usually best to remain outside the courtroom.
4. The attorney will probably want to discuss your testimony with you, which is a proper thing to do. If you are producing company records, however, do not turn them over to the attorney until

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the judge orders you to do so, unless the attorney for the company is there or you have been told to do otherwise.

#### WHILE GIVING TESTIMONY...

5. When you are called as a witness, stand upright while taking the oath. Pay attention and say "I do" clearly, so that all can hear. Try not to be nervous; there is no reason to be.

6. While you are on the witness stand, you are sworn to tell the truth. Your first obligation as a witness is to answer questions truthfully and accurately. Usually the best answer is the shortest honest answer which directly responds to the question.

7. Speak frankly and openly to the examining attorney. Do not cover your mouth with your hand. Speak clearly and loudly enough so that everyone present can hear you easily. Use the words "yes" and "no" in your responses. Do not nod for agreement or use phrases like "Uh, huh" as these cannot be properly transcribed by the court reporter and may cause problems later.

8. Talk to the members of the jury, if there is one. Look at them most of the time and speak to them frankly and openly as you would to a friend or neighbor. Do not cover your mouth with your hand. Speak clearly and loudly enough so that the farthest juror can hear you easily.

9. Speak in your own words. There is no need to memorize your testimony beforehand; in fact, doing so is likely to make your testimony sound "pat" and unconvincing. Be yourself.

10. Listen carefully to each question and make sure you understand it before you start to answer. In fact, it is good to pause a few seconds before answering to be absolutely sure you understand the question and that you definitely understand the meaning of each word forming the question. Have the question repeated if necessary. If you do not completely understand the question, do not try to respond based on what you think the question might or should be. Instead, simply say to the examining lawyer that you do not understand the question. You are under no obligation to interpret an imprecise or unclear question; it is the examining lawyer's job to ask questions clearly.

11. Refior Law Office will clearly explain what are the core issues of the case. Explain core issues clearly. If a question implicates a core issue, explain your answer clearly and fully, in your own words. Be sure your testimony makes your position on those core issues clear.

12. Look for double meanings. Be especially alert to questions which include terms with more than one meaning. If a question contains a term which is not perfectly clear to you, state that the intended meaning of a term in the question is not clear to you. You are permitted to ask the lawyer, "What do you mean by the term \_\_\_\_\_?" Also, be careful when long, complex, or double questions are posed to you.

13. Watch out for "when" questions. Volunteered information could be a time bomb. A "when" question refers only to time, not to sequence. Do not use "before," "during," "after," "at the same time as," or other temporal relationships in your answer to a "when" question.

14. Wait until the question is completed. Do not begin to respond until the examining lawyer has completed the question and is silent. Even if you feel that you know what information the lawyer is requesting, you run the risk of misinterpretation by breaking into the middle of the question.

15. Carefully consider your answers. Before responding to a question, consider carefully what you intend to say and have your answer clearly in mind. Again, even if you are completely certain of your answer, hesitate for a few seconds. This will permit lawyers to object to the question if it is improper.

16. If possible, answer directly and simply, with a "yes," "no," "I don't know," "I don't remember," or "I don't understand the question" to the question asked. Then stop. Do not volunteer additional information that is not requested. Explanations not only may include hidden dangers but also will make the examining attorney's job easier by suggesting follow-up questions. Otherwise, your answer may become legally objectionable under the technical rules of evidence and may also cause you to appear biased. If, however, none of the five preferred answers fit, give a factual response that is responsive to the question. Do not add gratuitous explanations. Do not try to guess where the examining attorney is going. Sometimes an attorney will try to limit you to only a "yes" or "no" answer. If that happens, be sure to say that you cannot answer the question "yes" or "no." Usually the judge will let you explain, but in any event, the jury will get the point. It is not your job to educate or to inform the examining lawyer. It is the attorney's job to determine carefully and precisely the matters about which to inquire, and to ask questions to elicit that information.

17. The court and jury only want the facts that you yourself have observed, not what someone else told you. Furthermore, they interested are not in your conclusions or opinions. Usually only "expert" witnesses are allowed to give their conclusions and opinions. Usually you will be unable to testify about what someone else told you.

18. Be careful to testify only as to those matters within your personal memory or knowledge. When at all possible, give positive, definite answers. Avoid saying "I think," or "I believe," or "In my opinion," when you actually know the facts. But if you do not know or are not sure of the answer, say so. There is absolutely nothing wrong with saying "I don't know." If you did not personally witness or observe that about which you are asked, then you are justified in saying you do not know the answer, even though you may have heard second hand facts or information. You can be positive about the important things without remembering all the details. If you are asked about little details that you do not remember, just answer that you do not recall. Do not give details such as measurements, dates, time intervals, and statistics unless you are certain of such details.

19. Do not exaggerate. Do not state overbroad generalizations that you may have to retract. Be particularly careful in responding to a question that begins, "Wouldn't you agree that...?" and "Isn't it true that...?" and "Wouldn't it be fair to say that..." Note also that statements like "Nothing else happened" are dangerous. After more thought or another question, you may remember something else. Say instead, "That's all that I recall," or "That's all I remember happening."

20. Be alert to "Factual Assumptions." You may be asked questions containing factual assumptions which you believe to be inaccurate or about which you have no knowledge. For example, the question "When Mr. Smith made the decision to fire Ms. Jones, did he consult with

you?" contains the assumption that Mr. Smith made the decision to fire Ms. Jones. If he never made that decision, or if you have no knowledge of the decision, then the question is improper. If you find the examining lawyer has asked such a question, you should respond that you are unable to answer. Do not let yourself be pushed around. Do not be tricked into answering unfairly worded questions or questions containing erroneous assumptions. Remember, you must listen to each question carefully before answering.

21. If a lawyer asks you questions which relate to an available document, request to see the document to refresh your memory before answering. Take as much time as you need. Do not be afraid to refer to parts of the document other than those the examining attorney has pointed out to you.

22. If your answer was wrong or unclear, correct it immediately. It is better to correct a mistake yourself than to have the opposing attorney discover an error in your testimony. If you realize that you have answered incorrectly, say "May I correct something I said earlier?" or "I realize now that something I said earlier should be corrected."

23. There are occasions when the best answer will be to voluntarily refer to documents. With the key documents that implicate core issues, like the contract in a contracts case, you may answer by referring to the document rather than trying to remember or describe its contents. However, do not confuse this exception with the rule against voluntarily telling the examining attorney where to find the answer.

24. Stop instantly when the judge interrupts you or when the other attorney objects to what you say. Do not try to sneak in an answer. ALWAYS show great respect to the judge. Answer the judge calling him or her "Your Honor." Listen to and learn from objections. If the examining attorney rephrases or asks a new question, deal with the new question and ignore the old one.

25. Usually, a witness should not ask the judge for advice. It is his attorney's job to object to any improper questions. When, however, you appear in court without an attorney, as frequently happens when records are relevant to a dispute between other parties, it is permissible, if a question seems clearly improper, to ask the judge if you have to answer it. Do not abuse this privilege, however, as it will make you appear evasive.

26. Always be polite even if the attorney is not. Do not be an argumentative or sarcastic witness. An apparent outburst of temper, the use of profanity, or the failure to take the proceedings seriously can be extremely harmful to a witness and to the party for whom the witness is testifying. Do NOT make faces, roll your eyes, raise your voice, sigh heavily or otherwise in attempts to communicate through non-verbal means.

27. Communication which you have with your lawyer for the purpose of seeking legal advice is generally privileged and confidential. In most cases, the examining lawyer cannot compel you to testify as to any such conversations or communications which you have had. If you are asked a question about any verbal or written communication with your lawyer, be sure not to answer until there has been an opportunity to enter the proper objection.

28. Do not be drawn into seemingly innocent conversation off the record or during breaks with the examining attorney or the opposing party. Anything and everything you say can and will be used against you. It is best to refrain from conversation with the examining attorney and the opposing party.

29. The honest witness has nothing to fear on cross-examination. Some of the rules set forth above may make more sense, however, if you understand what an attorney tries to do on cross-examination. If your testimony has not been harmful to his case or if he thinks that questioning you further will prove fruitless or counterproductive, he may waive cross-examination or ask a few perfunctory questions. If, however, your testimony has been damaging to his client, the opposing attorney will want to argue to the jury that they should not believe you. To make that argument, he wants to make it appear that you are a liar, or are biased, or are mistaken, or did not really have all of the necessary facts, or that you do not know what you are talking about. In such cases, the usual approach is to try to get you to say things that the attorney can show are not completely true. He will then argue to the jury: "Since the witness lied or was wrong on this point, his entire testimony is unworthy of belief." Here are a couple of "trick questions" that attorneys will sometimes use:

a. "Have you talked to anybody about this case?" If you say "No," the jury will think that probably you are not telling the truth, because a good lawyer always talks to his witnesses before they testify. Simply say that you talked to whomever you did - the lawyer, the police, or anyone else.

b. "Are you being paid to testify in this case?" The lawyer hopes that your answer will be "Yes," suggesting that you are being paid to say what the lawyer who called you wants you to testify. Your answer should be something like, "No, I am not getting paid to testify. I turned the subpoena fee over to my employer, and I will receive my usual salary."

30. Testifying for a substantial length of time is surprisingly tiring and can cause fatigue, crossness, nervousness, anger, careless answers, and a willingness to say anything in order to leave the witness stand. If you feel these symptoms, strive to overcome them, or ask the judge for a five minute break or to allow you to have a glass of water.

31. Be on guard during recesses. There are usually one or more recesses during a trial, and from time to time the lawyers involved in conversation "off the record." You should always be extremely guarded in your discussion of the case; it is best not to discuss the case at all. Lawyers representing opposing parties have their first loyalty to their clients. When the court reporter is transcribing testimony once again, lawyers can question you about matters that were discussed "off the record."

32. During a trial, your lawyer may have suggestions or comments to make to you, but will avoid making them either on the record or in a way that attracts the attention of opposing counsel. Generally, the lawyer for the witness will reserve comments until a break in the deposition. It is best not to initiate lawyer-client discussions either on the record or in the presence of opposing counsel unless absolutely necessary. In the event that you have a question at any time during the proceedings, you may request an opportunity to consult your lawyer. You have a right to confer with your lawyer at all times, even if it requires a break in the proceedings.

33. Now read these suggestions again. Some of them will mean more the second time through. If you have any questions, please ask your attorney before taking the stand to testify.

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