

The witness outline

By: F. Dennis Saylor IV and Daniel I. Small ◉ April 7, 2016



When it comes to organizing for trial and questioning witnesses, there is no “one size fits all” way to do it. Nevertheless, there are good reasons for and against different approaches.

In an earlier column, we agreed that using no notes is a bad idea: less effective, an invitation to disaster, and in some respects an insult to the jury’s patience and intelligence. In our last column, Judge Saylor advocated the use of scripts as the most effective and thoughtful approach.

Today’s column is written by Dan, who argues for a middle ground: a topic-based, well resourced, bullet-point-style outline.

Why not a script? It is, in many respects, an attractive option. Certainly it is the safest one. For some lawyers, particularly early in their careers, or if they don’t try cases regularly, it may be a helpful and workable one.

However, it comes with some inherent dangers that must be recognized.

Focus. There is a powerful magnetic attraction between your eye and the written word. It’s unavoidable. The more you have written down, the more you will look down and read. The more you look down, the less focus you have on what’s important, including:

- The witness — Keeping eye contact, assessing how he or she is doing, and listening for the odd words or facts that can make a huge difference in your case.
- The jury — Developing a relationship, judging how its members are reacting.
- The judge — Those telltale signals that you’re venturing in the wrong direction, or going on too long.
- Both benches — Maybe opposing counsel is not a good enough poker player to hide when an issue has hurt. Maybe your bench is trying to tell you something (e.g., did you forget to offer that last exhibit?).

Voice. Actors and actresses spend a lifetime learning how to read a script and sound natural. You haven’t. You have a different voice for reading, and most people can tell and don’t like it. They want you to talk with them, not read at them, even if that means you stumble occasionally. That only makes you more human.

Length. We’re lawyers, and therefore we write too much. Here is a key divergence between us. Judge Saylor believes that your questions are more likely to be too long and too repetitive if you do not write them out. Dan’s view is that in the process of writing out questions, many lawyers are likely to write them too long and too many. If your questions are so long that you need to write them out, they’re too long. And if you’ve written out seven really good questions on a point, but in court your witness does a good job covering the issue in just three, will you be strong enough and focused enough to skip the other four?

The good news is, there is a middle ground between no notes and a script. It’s a simple bullet-point-style outline. Properly done, it’s more of a checklist than an outline.

The goal is to give you both inspiration and guidance. Whether you’re staring down a witness across the deposition table, reading an exhibit, or watching a jury’s reaction, you can easily return to your checklist, see where you are, and know where to go from there. To be effective, it must be thorough, user-friendly and well organized.

The witness outline should be in a three-ring binder, with one subject matter per page. The text should always be in large type, with generous spacing, so you can glance at it and find your place.

Draw a line two-thirds of the way over on the right-hand side and a line toward the bottom. On the left-hand side of the page are the notes for questions, indicated in short bullets. No full sentences, no question marks, and nothing that is more than three words long. These are simply topics. You are creating a checklist of the things to ask that witness.

The only exceptions to this general rule are quotes from a statement or a document, questions that are foundational ("Is this being kept in the ordinary course of business?"), or hypotheticals presented to an expert witness.

The right-hand side of the witness outline is for your notations: anything that backs up the questions you are asking. Every reference and any exhibit or citation that relates to a question you intend to ask should be noted on the right side of the witness outline (e.g., references to depositions or other transcripts, with page and line numbers, exhibit and/or Bates numbers, and more).

The other item that goes on the right side of the line are notes to yourself. You should include items that will help you during the trial or deposition. Next to exhibit references, write "Offer." If you tend to talk too fast, write "slow down." If you wander around too much, write "stand still." These are your notes. They are for your eyes only.

If a document is worth mentioning in your witness outline, it also is worth including in the notebook. You should "mark up" one copy of the document and place it in the notebook. Then, take three copies — for the witness, the court and opposing counsel (or more depending on how many lawyers are going to be involved) — and put them in a plastic sleeve to ensure that everything you need is right there.

The bottom section of the witness outline should include your citations. If there is an issue of law you think may come up, address it in the witness outline and have relevant case and/or law citations included at the bottom of the page. If it is a key point, you could prepare a "mini-memo," which is literally a one- or two-page memo about the relevant law that expands on it slightly. Put it in your notebook, with copies in a plastic sleeve.

If you are prepared to counter an objection with a mini-memo for the court, you will probably not get as many objections, and if you do get objections, the judge is more likely to trust you because he will believe that what he needs to rule on the issue is "in there." Being prepared in this way allows you to present the issue to the judge in a way that increases your credibility.

This system can be used whether you are dealing with a small case with only one witness, or a large, complex case with dozens of witnesses. Every notebook (one for each witness) is an independent, complete and separate item. While the size and number of notebooks will change, the concept stays the same.

While this system has been used by lawyers for many years, it is not any one system in particular that is essential. What is more important is that you develop your own system that you feel comfortable with, and then use it in a disciplined and focused way.

Consistency is the key. Every time you open up the notebook, what you see on the page is comforting and familiar to you. Every time you open the witness notebook, no matter what the situation, no matter how frazzled you are, you can have confidence that you are prepared, and what you are looking for is "in there."

Previous installments of Tried & True can be found at masslawyersweekly.com. Judge F. Dennis Saylor IV sits on the U.S. District Court in Boston. Prior to his appointment to the bench, he was a federal prosecutor and an attorney in private practice. Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. He is a former federal prosecutor and teaches CLE programs across the country.