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Getting rid of clutter in direct examination

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Trials tend to be plagued by verbal clutter — that is, unnecessary words spoken by lawyers and witnesses (and, yes, sometimes judges). Those words obscure the purpose of the testimony, frustrate and confuse the jury, and prolong the trial.

As we have said before, your questions should be as short and simple and clear as possible. You can't always control what your witnesses say, but you can control what comes out of your own mouth. The jury's job is hard enough; don't make it more difficult — and your case less compelling — by adding extra words to your questions.

One of the many things that lawyers do to add extra words is to attach pointless phrases to the beginning of their questions. A phrase like "can you tell us" or "describe if you would in your own words" doesn't do much harm all by itself. But it doesn't add anything, either, and those small increments of unnecessary verbiage add up over time, especially in long trials. And sometimes the extra words are not just pointless, they're actually detrimental to your case.

Don't undercut your questions with a bad opening phrase. There are lots of bad ways to begin a question. Here are four common examples:

1. Don't begin questions with "do you remember …?"

These words are extraneous. Witnesses are of course testifying from memory. (They also seem to invite the witness to say, "I don't remember.") But the real problem is that the question is inherently ambiguous. Strictly speaking, the question calls for a "yes" or "no" answer. But what does that answer mean?

Do you remember being in Dallas?

No.

Is he denying that he was in Dallas?

[I was never there.]

Or is he saying that he's not sure?

[I might have been there, but I don't remember.]

The problem is compounded when the question has more detail:

Do you remember being in Dallas, Texas, on April 22, 2004, with John Smith?

No.

Does he remember part of it?

[I was in Dallas with John Smith in April.]

But not all of it?

[I don't remember the exact date.]

Instead, simply ask:

Were you in Dallas, Texas?

or

Were you in Dallas, Texas, on April 22, 2004?

2. Don't begin questions with "can you tell us whether …?"

Again, this calls for a "yes" or "no" answer, and thus creates ambiguity. Here are two real-life examples:

Can you tell the jury whether you reported that income on your tax return?

Can you tell the jury whether any taxes were withheld from your paycheck?

Suppose the witness answers "no" to the first question. Does that mean the witness did not report the income? Or does it mean that he cannot tell the jury whether he did?

Just ask it directly:

What income did you report?

Were taxes withheld from your paycheck?

3. Don't begin questions with "would you have …?"

Such a question is almost always improper. Among other things, it is unclear whether the questioner is asking the witness whether he did something, or not. For example:

Would you have reviewed this document?

Is the lawyer posing a hypothetical question? Or is she asking what the witness actually did?

Ask instead:

When did you first see this document?

What did you do with it?

Likewise, do not accept answers using the phrase "I would have."

Did you mail the letter that day?

[I would have put it in the mailbox on my way home.]

Is he saying he did put it in the mailbox?

Or is he saying it was his practice to put letters in the mailbox on the way home?

Or is he saying it's likely that he mailed the letter?

Or is he just speculating?

Follow up with a question that forces the witness to clarify.

Did you actually put it in the mailbox?

4. Don't begin questions with "did you have an understanding as to …?"

Witnesses are usually limited to testifying about their perceptions — in particular, what they saw and what they heard — and their actions. A witness' subjective beliefs or understandings are sometimes relevant, but under fairly limited circumstances.

Nonetheless, lawyers often ask witnesses for their "understanding as to" what happened, instead of just asking the question directly.

Did you come to an understanding as to where the company was incorporated?

There's rarely any reason for this. Normally it's just a convoluted and incorrect way of asking the real question:

Where was the company incorporated?

If it actually matters how or when the witness learned something, ask that:

Did you learn where the company was incorporated?

How did you learn that?

When was that?

Of course, if his subjective understanding actually matters, and sometimes it does, go ahead and ask that.

A good rule in life is to get rid of the unnecessary stuff that fills your house and only serves to get in your way. The same applies to trials. If it doesn't help, it's probably in the way and you should get rid of it.

Previous installments of Tried & True can be found here. 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.