Be a Litigation Star

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There are many things to consider when it comes to litigation, especially for those who are new to the game. Part of it is learning from experience, however, it doesn't hurt to get tips from some seasoned litigators. A panel of experienced counsel offered advice on what to do and what *not* to do during discovery, examination in chief, and cross-examination at a seminar on civil litigation at the Ontario Bar Association Institute in February.

Discovery

The panellists emphasize the importance of preparation — not only by you the lawyer, but your clients too. Barry Weintraub, a partner at Rueter Scargall Bennett LLP, says you need to explain the overall context and importance of the process to your client. "You need to drive home to the witness the importance of the examination in the overall context of the case," he tells *Canadian Lawyer*. "It's not something that is to be taken lightly, and a lot of times what you need to guard against is a client who thinks that it's a simple matter of just showing up and answering the questions without being prepared for it."

Richard Swan, a partner at Bennett Jones LLP and co-head of its commercial litigation practice, says it's wise to meet with your client before the discovery to go through all the documents with them. He also suggests taking your client through questions that will be asked.

However, it's also important to remind clients not to answer questions that aren't being asked, says Weintraub. He means making sure they avoid long-winded answers or speeches. Part of that is being in control of your client, to which he suggests trying techniques such as asking straightforward yes or no questions, changing your tone of voice, changing your pace, etc. "It's like an artist's painting: you need to paint but you also need to practise and in doing that you need to be conscious of techniques that you can use to improve the overall quality of the picture you're painting," he says.

You must also be ethical, says Swan. When going over the discovery questions with your client, you can't suggest answers to them. One way to avoid this is if the client provides a misleading answer, simply repeat the answer back to them and ask if that's what they meant, which usually clears up any ambiguity, he says.

Another point emphasized by the panellists was the importance of listening to the witness' answers during discovery. "Among younger counsel, you see it very often that they will come into a discovery . . . they will have a list of questions, they'll ask a question, and then they will start looking at their notes to see what their next question is so they're prepared and articulate it well, and they're not listening to the actual answer that the witness is giving," says Swan. "You should often be questioning off the last answer not off of your next note." And most importantly, "don't be on your BlackBerry!" warns Swan, who has frequently seen lawyers checking their phones while their client is answering a question.

Another point to note is not to be afraid of unhelpful evidence that's revealed during the discovery. "If the other side starts to give evidence that's very unhelpful to your case, it's important to pursue that evidence with vigour and get the witness' whole story — even though it's unhelpful to you — so that you're not surprised by it at trial," says Swan.

Most panellists warned against bringing a list of questions to the discovery. Swan says you shouldn't be wedded to a script as you need to go with the flow. Instead, he suggests writing point-form notes and then

reviewing them at the end of the discovery to ensure you've covered everything.

Examination in chief

Alfred Kwinter compares the examination in chief to storytelling. A founding partner of Singer Kwinter, he says it's important to ask short, clear, concise questions, and present them in an orderly manner. Think to yourself, he advises: "How is this witness going to help my case and can this witness hurt my case?"

Ontario Superior Court Justice E. Eva Frank shares her insight as a judge and offers some pointers to litigators. It's "enormously challenging" to stay focused on the testimony as the acoustics in the courtroom are terrible with no amplification system, she says, so judges are often left straining to hear the testimony. So lawyers should speak loud and clear, and instruct clients to do so as well. Speaking slowly also helps since judges are trying to listen to the testimony while taking notes.
"Preparation is critical," says Frank, so ensure your witness knows what is expected of them in court. It is also wise to instruct your witness not to start answering a question until counsel is finished asking it as it can interrupt the flow of the testimony and throw off the judge.

The judge also advises counsel not to use a script, but to "be cautious about asking your witness unnecessary questions," which is why it's so important to listen to their testimony. She said it also helps if you tell the judge what the purpose of the witness' testimony is to provide some context.

Frank explains the biggest revelation she had when joining the bench was the disconnect between the information the judge and the lawyers have. "I always want more information than I get. The only information the judge has to base their analysis on is what witnesses say and the evidence that's submitted." She suggested giving the judge a roadmap and providing information for context so judges get the full picture.

In addition, Weintraub says it's critical the witness — not the lawyer — tells the story during the examination in chief. "The most important thing is to make sure that the witness is front and centre for the judge. Ultimately the strength of the case boils down to whether the witness' evidence is going to be believed or not, and you want your own witnesses to be believed. That means letting the judge become comfortable with that person."

Swan says counsel need to consider the difference between leading their witness and guiding them. "At the beginning of an examination in chief, it's perfectly appropriate to lead the witness on non-contentious background questions and as you get further into the examination, you can give the witness guide posts so they know what you're talking about," he says.

Kwinter also notes it's worthwhile bringing out all of the weak points of your case during the examination in chief because it's better than having opposing counsel doing it.

Cross-examination

During the cross-examination, Swan says questions need to be more carefully scripted and seek specific answers, but don't start with the confession question. "Work up the ladder to get to that point and ask the subset questions about which you think the witness will admit," he says. In doing so, however, Ontario Superior Court Justice Mary Lou Benotto says it's not OK to read off your notes.

It's critical you're attentive to the judge, says Swan. "As you're examining or cross-examining a witness, as counsel you should be looking at the witness but you should also be frequently looking over at the judge to see how the judge is reacting to the evidence. That may be as simple as does the judge need help finding the document that you're on? Is the judge troubled by something? Is the judge distracted and not listening because he's looking for something else? So you do have to monitor what the judge is doing. You should be almost as alert to the judge as you are to the witness," he adds.

Bryan Finlay, a partner emeritus at WeirFoulds LLP, says, "Re-examination is a bit like dismantling a

bomb." He advises not to spook the client, but to be realistic with them so they're prepared, which includes getting them to reveal all of their skeletons to you.

And finally, the panellists recognize the litigation process can be intimidating — not only for the witnesses — but as their lawyer you will need to buck up. "There are times when you have to be fearless even if it is a little bit out of your comfort zone when examining a witness," says Swan.