

The Art of Trial Advocacy

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It is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews

Introduction

Witness are at the heart of virtually every criminal investigation and trial. Through them it can be learned whether a crime occurred, when it occurred, and who might have committed the crime. Even if there is physical evidence, a witness is necessary to introduce that evidence at trial. In fact, without witnesses (or without a stipulation from both parties) it would be impossible to present a case. Yet, despite the obvious importance of witnesses and the information they possess, little attention is given to how attorneys get information from witnesses. This article focuses on the art of interviewing witnesses and, in particular, on the process of building rapport during an initial interview.

Rapport and the Interview

Many attorneys believe that by simply asking the right questions, they can elicit all the relevant information that a witness knows. Certainly, asking the right questions is important, but the method of asking questions is often just as important as the questions themselves. How a witness feels about an attorney will likely affect the quality of his answers. The interview, especially the initial interview, is an opportunity for the attorney to forge a connection or rapport with the witness. This rapport should encourage a greater flow of information from the witness and greater cooperation throughout the case.

An attorney's method of building rapport is very personal, and differs from one person to another. An attorney must use a method that feels natural and then practice it. Like any other advocacy skill, rapport building must be thought about, practiced, and refined. Although styles of rapport-building are very different, there are some techniques, which are discussed below, that will aid in this process.

Empathy

Empathy is defined as "the projection of one's own personality into the personality of another in order to understand the person better."¹ To build good rapport, trial advocates should try to empathize with the witness. Most witnesses find being interviewed stressful, but some will find the interview more stressful than others. For example, if the witness is a junior enlisted soldier, the stress of the interview will likely be compounded because an officer is conducting the interview. For

most junior enlisted soldiers, their interaction with officers is limited. They see officers at unit formations or around the battalion area, but they rarely have conversations with officers. If a junior enlisted soldier is having a conversation with an officer, it is usually because he has done something really good or really bad. Attorneys who interview junior enlisted soldiers should be sensitive to this potential added stress.

Because interviews are stressful for witnesses, it is not surprising that the chief objective of most witnesses is to leave the interview as quickly as possible, regardless of whether they have provided all the relevant information. If you add into this formula a witness who has had some negative experience with the criminal justice system or has some private agenda, the process of getting relevant information becomes that much harder. By adjusting your interview technique to empathize with the witness, you can increase the likelihood that you are getting the greatest amount of information from the witness.

Clueing the Witness In

This approach links with empathizing with the witness. When you look at the interview from the witness' perspective, you will see that much of the stress of the interview comes from the unknown. Often witnesses will come to your office never having met you, and never having been interviewed by a lawyer. Witnesses do not know what to expect from you or what you expect from them. They may have preconceptions about lawyers that make them wary. Let them know who you are, why they are in your office, and who you represent. Let the witness know that all that is important to you is the truth. Some witnesses believe if you represent the government, you are only interested in convicting the accused. Some witnesses believe that if you represent the accused, all you want is to get your client "off." Truth is nowhere in the equation. Let all your witnesses know that the truth is at the heart of your endeavor. Tell your witnesses that all you ask of them is that they are truthful and complete in their answers. By "clueing witnesses in," you will be giving them the courtesy of an orientation statement and letting them know that you will not ask them for anything that they cannot give.

Demeanor and Body Language

When conducting an interview, remember that witnesses are learning about you through observation, just as you are about them. Through your demeanor and body language, you will be telling witnesses things about yourself and your case. It is

1. WEBSTER'S NEW WORLD DICTIONARY 445 (1995).

therefore important that you tell them, through your demeanor, what you want them to hear.

You want to convey confidence in yourself and interest in what the witness is saying. To that end, your demeanor should be even-tempered, polite, and objective.² You should sit erect or leaning slightly forward with your feet flat on the floor. Make sure that you are facing the witness, not your computer screen. Do not swivel in your chair, bounce your leg, or tap things—these behaviors convey that you are nervous. Try not to slouch or cross your arms, which may convey disinterest or a lack of openness to what the witness is saying.

The bottom line is that you do not want to sabotage your interview through your demeanor or body language. Be aware of your body language and demeanor, and use it to encourage your connection with the witness.

Eye Contact

It may seem obvious that eye contact is important to building rapport, but appropriate eye contact is an interpersonal skill that many attorneys neglect and need to develop. Good eye contact will be one of the first bridges you build in the process of creating rapport with a witness. New counsel may feel uncomfortable in witness interviews; they either avoid eye contact or they exaggerate eye contact and start staring. How much eye contact is enough? Think of the interview as a conversation. The natural eye contact you give people during an interesting, one-on-one conversation, is the kind of eye contact you want.

Of course, just because you want to have eye contact with a witness does not mean that the witness wants it with you. Often witnesses do not want to have eye contact during interviews. They would much rather look at the floor or out the window than into your eyes. You can use specific techniques to encourage eye contact and help build rapport. First, sit close enough to the witness so that eye contact with you is natural. Usually two to four feet is a good distance to encourage eye contact. Less than two feet will encroach on the witness's personal space, and further than four feet gives the witness lots of other places to look instead of at you. Talk to the witness, not to your computer screen or at the piece of paper on your desk. Make sure your focus and your vocal energy is directed at the witness. If the witness refuses to make eye contact, continue to offer your eye contact and continue the interview.

Location of the Interview

The location of the interview should encourage the rapport you seek to build. Experts suggest that the interview room should be ten feet by ten feet, with overhead lighting and neu-

tral colored walls;³ in reality, however, you may not have many options for the interview room. It is likely that you will have to use your office, so you should prepare the office before the interview. Your office should be clean, with enough chairs for those who will be present. Do not set the desk up between you and the witness as that will interfere with the rapport you want to create. Forward or disconnect the telephone, and place a sign on your door to prevent interruptions. The idea is to have privacy and as few distractions as possible.

To Script or not to Script

New counsel often want to use a script of questions during an interview. Scripts give the attorney a kind of security blanket, especially when tension rises during the interview. Ideally, you will not use a script of questions during your interview. Following a script severely interferes with the building of rapport with the witness. An attorney who is following a script has less eye contact and displays less confidence than one without a script. Scripted questions often cause counsel to doggedly shuffle from question to question, rather than follow the natural flow of the interview. A flowing interview is critical to getting all the relevant information possible from a witness. An interview simply will not flow when the interviewer is following a script. At times, with a reluctant witness, the attorney must build a rhythm of questioning and have the witness answer questions without sanitizing the replies. Such a rhythm is virtually impossible when working from a script. If there are critical questions that must be answered and you are afraid you will forget them, write them down and ask them at the end of the interview.

There is an important distinction between not using a script in an interview and not preparing. To conduct an interview properly without a script will take more preparation time than scripting the interview. New attorneys may want to script out their questions, turn that script into an outline, and then use the outline in the interview. If the attorney feels the interview is going badly or he is missing critical questions, the attorney can take a break and review his notes. The fruits of thoroughly preparing for interviews will be the time saved in not having to re-interview witnesses, and the added rapport the attorney will build with each witness.

Having a Third Person at the Interview

The argument in favor of having a third person present during your interviews is that the third person can testify about what the witness said during the interview, if the person you interviewed changes his story at trial. The argument against having a witness present is that it interferes with the building of rapport between the attorney and the witness.

2. John E. Reid & Associates, *The Reid Technique, Interviewing and Interrogating* 6 (1989) (unpublished seminar materials) (on file with author).

3. *Id.* at 4.

Although having a third person present may make witnesses a bit more reluctant to give information, it does provide a safety net. You simply cannot tell when witnesses are going to change their testimony at trial. The presence of a third party gives the attorney the option of refuting a witness's testimony. The presence of a third party also offers the attorney the opportunity to get another person's opinion on the witness's demeanor and believability.

Time

Another factor that will affect your efforts to create rapport is time. Building a connection takes time. Make sure to schedule your interviews for a time when you can conduct the interview completely. Interviews often take longer than expected; you should schedule your interviews so that you can go past the time you planned without missing other scheduled events. For example, if you have an interview that you expect to take an hour and a half, do not schedule it for the two-hour block before an important meeting. Instead, consider scheduling it for a part of the day where you have no other scheduled commitments.

Preparation

It has been said, "Nothing so undermines the confidence of a court or jury in a lawyer as his constant groping and fumbling."⁴ This comment is equally true of interviewing witnesses. If an attorney is unclear on the facts or fumbles the facts, the witness will lose confidence in the attorney and the rapport will likely weaken. You must read the entire investigation file and know the contents of all witness statements. If the

witness you are about to interview has made a statement, you must know its content and have a copy available for the witness as well as for yourself. If relevant to the interview, you should have visited the crime scene. By thoroughly preparing for the interview, you will know what questions to ask and when the answers do not make sense.

Suggestions, not Commandments

Any of the suggestions in this article can be taken to an extreme and become ineffective or harmful. For example, eye contact is important, but taken to an extreme it will unnerve your witness. Instead of conveying that you are an attorney who is interested in the witness, you are conveying that you are a psychopath. Another example could be made with empathy. By properly empathizing with the witness's situation an attorney can adjust their interview technique to relate better to the witness; but too much empathy may cause an attorney not to ask necessary questions. Ultimately any suggestions in this article must be applied according to your personality, and common sense.

Conclusion

At the heart of every criminal trial are witnesses. The information they possess can be the difference between conviction and acquittal. Improving how advocates get that information from witnesses deserves thought and effort. A good rapport will lead to a greater, free-flow of information between attorneys and witnesses. This flow of information will allow attorneys to better represent their clients. Major MacDonnell.

4. JAMES W. McELHANEY, TRIAL NOTEBOOK 4 (1994); SUCCESSFUL JURY TRIALS 100 (J. Appleman ed., 1952).