Recovery and Rehabilitation

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Summary

- The best way to deal with a forgetful or impeached witness is to prevent it from happening in the first place.
- The first step in the preparation process is to get a complete command of the facts about which the witness can testify.
- Leading is in the eye of the beholder, and some judges are more restrictive than others.
- You have to know your judge and be prepared to ask questions in a way that will pass the judge's test of leading.

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Witness testimony provides you—the trial attorney—with the opportunity to present the facts to the jury. Other than your jury statements, this is the part of the case over which you have the most control. As Thomas Mauet wrote, when planning and organizing a direct examination, you are like the director of a film. You decide how you want to portray the scene or the event. Through your questions, you control the facts about which the witness testifies. You can avoid or gloss over unimportant matters. You can focus on the important matters and zoom in on the details. You can then emphasize those important matters through exhibits and follow-up questions. You are in control, and through your direct examination, you can use your witnesses to present your case to the jury in the best possible light.

But sometimes the best-laid plans for your witness's testimony go awry. For example, the witness on direct might forget or misstate facts the witness easily recounted in your office. Or worse yet, the witness might be "destroyed" by an effective cross-examination.

In this article, we explain why you should prepare your witness for all parts of the witness's testimony: direct, cross, redirect, and recross. We believe that by taking a holistic approach to preparation, you can anticipate and prevent (or at least minimize) potential issues. But because even the best-prepared witnesses can struggle on the witness stand, we will also provide you with some tips and tricks on how to recover from the unexpected.

That said, we begin with a reminder. These are not novel concepts, but first principles. They have been passed down from one generation of lawyers to the next and discussed in treatises, articles, and lectures. But lawyers do not always agree on the best way to do things. Excellent trial lawyers sometimes disagree on how to try a case, as can be seen, for example, in two noteworthy books on trial practice: Herbert Stern's five-volume treatise *Trying Cases to Win* (2013) and Thomas Mauet's book *Trial Techniques II* (10th ed. 2017). Both are widely read and well regarded. Yet, the authors sometimes disagree on how lawyers should prepare for and conduct various aspects of a trial.

Why do we bring this up here? We have seen different techniques used effectively in similar situations. And as a result, we share a piece of advice that all trial attorneys should remember—there is not necessarily a right way to conduct every aspect of a trial. To be sure, there are legal requirements that must be followed and guiding principles that should be considered. But when it comes to trial strategy, tactics, and techniques, there is no one-size-fits-all formula. Although a particular technique may be effective in one case, it may be completely ineffective in another. To that end, we discuss some guiding principles and provide you with our thoughts on how to prevent and deal with witnesses who do not perform as expected—all so that you are better able to pick the right combination for your particular case.

Preparation: Avoid the Need for Recovery and Rehabilitation

As the old adage goes, an ounce of prevention is worth a pound of cure. And so it is with witness testimony. The best way to deal with a forgetful or impeached witness is to prevent it from happening in the first place. How? By thorough preparation.

The first step in the preparation process is to get a complete command of the facts about which the witness can testify. You should fully discuss all the facts with the witness, as well as with any other potential witnesses with knowledge of the subject matter. You must identify and understand the reasons for any differences in recollection and in each witness's ability to see, hear, and affect the events that are the subject matter of the witness's testimony. You should review all relevant documents and other types of evidence, such as video and audio recordings.

Then evaluate what you have been told. Just because the witness is friendly does not mean the witness has told you the truth. Your witness may have omitted details, shaded the truth, or outright lied to you. Perform a credibility check to determine whether there is any unambiguous objective evidence of untruthfulness on the witness's part. Depending on the nature of the testimony and the importance of the witness, this inquiry could encompass criminal history (including investigations and arrests that did not result in a conviction), bankruptcy proceedings, civil lawsuits (including divorce), any disciplinary action at work or by a licensing board, and firings or demotions. You should review all statements made by or about the witness in connection with any of the above, including the witness's communications and social media activity.

You should check for bias. Again, depending on the nature of the witness, look for indications of improper motive or bias. It is the rare biased witness who will admit to being biased or having an improper motive. Accordingly, it is up to the advocate to test for bias or improper motive. In addition to existing family, social, and employment situations, ask what effect the witness believes his or her testimony will have, for example, on the witness's social standing or job prospects. A witness could, for example, be concerned that testifying against a particular company could affect both the witness's current job and future employability.

Similarly, test the credibility of key witnesses through other records and objective criteria. For conversations and observed events, you should ensure that the witness had the ability to hear or see what is being relayed. This requires detailed questioning and, on occasion, a visit by the attorney to the relevant location. When a witness describes a specific telephone conversation, the attorney may seek, and review, the witness's phone records to corroborate the conversation. Trips abroad, credit card purchases, stock purchases,

bank transactions, conferences, and meetings are other examples of discrete historical events that may be readily corroborated. Also keep in mind that events peripheral to the most important elements of the testimony may be relevant to establishing a particular witness's credibility (or the lack of it).

Finally, determine from the witness (and others you interview) what, if anything, the other side may know about the witness that could be used to confront the witness on cross. Search the internet, media, legal databases, and social media outlets for information concerning your witness. Ask the witness whether there is any subject matter about which questioning would concern the witness, like social media posts.

Before planning and executing a direct examination, you should also determine the capabilities of the witness. In any endeavor, it is rarely fruitful to ask someone to perform a task for which that person lacks the basic capability. Relevant witness capabilities and characteristics you should evaluate include communication skills, presence, attitude toward the process, anxiety level, combativeness, ability to do an effective demonstration, willingness to participate in the trial process, and of course, overall effectiveness. In short, if the witness cannot deliver what you need, consider whether you should call the witness.

Your witness's capabilities should also inform your questioning. For example, if your witness recounts an event beautifully, you may want to ask the witness open-ended questions that allow the witness to tell the story, following up with closed-ended questions as necessary. On the other hand, a nervous witness who does not communicate effectively may fare better with closed-ended questions that call for short, specific answers. (Open questions are ones that elicit a narrative or descriptive response from the witness. For example: What happened when you got home that night? Closed questions are ones that call for very specific answers. For example: How close was the robber when he pointed the gun at you?)

Orient the witness. Go over the basics of where the witness will be in relation to the questioner, the jury, and the judge. Show the witness a courtroom setup if possible. Even better, ask the witness questions in that setting. Go over how you will review documents, including whether you will review documents on paper or electronically. Trial testimony is uncomfortable and strange enough—make your witness as comfortable as possible by going over these basics ahead of time.

After gaining a command of the facts and an understanding of a witness's capabilities, the next step is to prepare the witness and yourself to conduct the direct examination. Two initial questions are relevant here. First, do you go over with the witness the actual questions you will ask? Second, do you write out all of your questions in your notes? Here is an example in which there is a divergence of views between Stern and Mauet.

Stern suggests that you not write out your questions. Rather, he suggests writing out the words of the witness as you want to hear the witness say them. Stern believes that this will prompt you to ask the questions naturally. For example, the note "I drove to court today in my car" should prompt a question like "How did you get to court today?" Stern believes that this method is more conducive to a natural give-and-take with the witness and that this will result in testimony that is clearer and more memorable. Stern also believes that you should not go over your direct with the witness in the exact manner in which you will question the witness at trial. Rather, he suggests preparing the witness by theme or subject, not necessarily in the order in which you will ask the questions. He believes that this too results in a more natural examination at trial, and it will also shield you and the witness from a cross-examination argument that the witness's testimony has been "rehearsed." *See generally* STERN, ch. 11.

Mauet, on the other hand, believes that you should "ask[] the actual questions the lawyer will ask and hear[] the actual answers the witness will give" and "practic[e] enough so that the witness understands how to testify, understands what you will bring out during the direct examination and why you are doing it, and understands how to answer questions confidently and clearly, until the witness becomes comfortable in that role." MAUET, at 143–44. By adhering to Mauet's advice, both the witness and the lawyer will hear the questions and answers multiple times, which could reduce the odds of the witness giving an unexpected or unhelpful answer when on the record. Running through the examination with the witness also may bring an efficiency to the trial testimony that might not be present otherwise. Of course, substantial preparation of your witness could lead to the "rehearsal" attack on cross-examination (e.g., "the lawyer had to meet with the witness so many times to get the story straight"). However, we note that jury instructions may be helpful here, particularly if the court instructs the jury that it is an attorney's duty to meet with and prepare a witness for trial.

As we noted earlier, only you can decide what approach is best for you. For example, our preference is to prepare by subject or theme. But there is nothing wrong with, at some point in the process, going over the subjects in the order in which you plan to cover them during the direct. When preparing in this manner, however, always advise the witness that this is not a rehearsal and that you may not ask questions in the same way and you may not ask about things in the same order. This will blunt the impact of the "rehearsal" cross.

In preparing ourselves to conduct the direct, our preference is to write out the facts—each and every one—on one side of the page. If each fact is written down, you will see what facts have been elicited and still need to be elicited. If it would make you feel more comfortable, write out possible questions in the other column. And consider writing out technical foundation questions.

Finally, you must have all your exhibits in order and ready to show the witness—both in hard copy and electronically. When using electronic evidence, you must make sure that all equipment is in working order before you conduct the direct. Moreover, to the extent that you have documents that might refresh the witness's recollection about facts you are going to elicit, you should have those documents organized and ready to show the witness if the witness's recollection needs refreshing on the stand. Here, teamwork is vital. The other members of the trial team—from the paralegals to the other lawyers—should know what exhibits are being used and be ready to assist you with having them ready to present to the court and jury.

Preparing your witness for cross-examination is just as important as preparing your witness for direct. Undergoing cross-examination is a completely foreign experience for most witnesses, and it is inherently stressful for everyone. Cross is designed to give the examiner an advantage over the witness. The questioner can use leading questions and seek "yes" or "no" answers, often with the judge enforcing this unfair dynamic. Cross isn't a dialogue between equals; the witness cannot ask questions, make objections, or give comprehensive explanations (though sometimes they do—or attempt to do—all three). Also, the prepared cross-examiner will be ready to confront your witness with prior inconsistent statements, bad acts, or other impeachment evidence. And even if your witness's substantive answers are neutral, *how* the witness delivers those answers—for example, meekly, defensively, or combatively—may affect the jury's perception and undermine the witness's credibility. With all these disadvantages, you should anticipate that cross-examination will be challenging for your witness and your case.

Here, preparation again proves vital. Spend time with your witness on the process to follow in responding to questions on cross. We suggest instructing the witness to take the same approach to answering questions on cross as on direct: to listen carefully to the question; to make sure to understand what is being asked; to answer truthfully and directly, offering respectful explanations if necessary. Also, the witness should understand that you might object to the questions; so the witness should be aware of that before answering. We suggest the witness follow this measured approach regardless of the examiner's demeanor or questioning style. The best response to an aggressive and rapid-fire cross-examiner is rarely to get into a shouting match or respond with equally rapid answers. By sticking to a process of methodically evaluating and answering each question, your witness may avoid the unforced errors that can happen during the stress of cross.

The witness's demeanor is another potential land mine. A witness who starts having memory lapses or displays sudden changes in personality on cross will likely lose whatever credibility you helped the witness build on direct. And there is a fine line between a witness who asks for clarification of a confusing question and one who litigates every word. Conversely, a witness who begins to shift his or her answers whenever

prompted by repeated or aggressive questions may similarly torpedo his or her credibility. You should counsel witnesses to maintain a consistent demeanor, no matter who is asking the questions and no matter how challenging that may be.

In addition to how to deal with questions generally, you should go over specific lines of cross. With all your preparation, you should understand the main points your opponent will seek to make on cross-examination. Go over them with the witness. Devote time to seeing how the witness will respond to such questions when confronted on cross. For potential bad acts and inconsistencies, we suggest guiding the witness on how to acknowledge them without giving your adversary additional ammunition, which might happen if the witness minimizes his or her conduct or quibbles over details. Often, simply acknowledging the bad fact without any fanfare is the best option on cross.

An even better option is to front bad facts on direct. We strongly suggest dealing with your witness's negatives on direct examination, rather than waiting for cross. This is called "drawing the sting," and it is preferable because it allows you to control how the negative information is presented to the jury, rather than leaving it to your adversary. Moreover, by dealing with your witness's negatives yourself, you avoid leaving a misimpression that you were concealing these bad facts from the jury.

To bring all these concepts together for your witness, we believe that it is critically important to conduct a mock cross-examination. The first time your witness experiences hostile leading questions should not be in front of the jury. As in most new experiences—particularly ones that can be humbling—practice will help. Even subjecting the witness to brief intervals of cross during prep sessions can be beneficial so that the witness becomes acclimated to the constraints. For significant witnesses, we suggest an extensive mock cross-examination on important subject areas and weak spots. The mock cross should be conducted by someone other than you, the attorney conducting the direct. This will preserve your relationship with the witness, allow an opportunity to observe how your witness performs, and then give you room to build your witness's confidence back up afterward. Finally, we have seen occasions in which the mock cross reveals strengths in your witness that you did not realize, or weaknesses consequential enough to drop the witness entirely. For example, we have encountered witnesses who are more comfortable responding to leading questions on cross-examination rather than recounting facts themselves on direct.

When Things Don't Go According to Plan

You are now in the courtroom and ready to put your witness, Jane Smith, on the stand for direct examination. You are fully familiar with the facts. You went over them with the

witness. You prepared your outline for direct examination. You have all the exhibits in order. Put simply, you feel prepared.

One of the key facts you want to elicit is the date of a meeting between the witness, Jane Smith, and the opposing party, John Doe, at which they discussed the signing of a contract. That meeting occurred at the XYZ Restaurant on Saturday, November 30, two days after Thanksgiving, on November 28. Therefore, during your direct, you ask the following questions:

> Q: Did there come a time when you and John Doe had a meeting at which you discussed the signing of the contract?
>
> A: Yes.
>
> Q: Do you recall where that meeting took place?
>
> A: Yes.
>
> Q: Where did the meeting occur?
>
> A: XYZ Restaurant.
>
> Q: Do you recall when that meeting occurred?
>
> A: Uh . . . no, I don't.

Now what do you do? There are several possibilities.

First, if you have a document, you can refresh the witness's recollection by showing it to her. For example, if the witness wrote the date, time, and place of the meeting on a document, you could show it to her to refresh her recollection about the day on which the meeting occurred. Here's how the questioning might go after her failure to recollect:

> Q: [Hand the exhibit to the witness.] I am showing you what is marked as Exhibit 1 for identification. Please review that exhibit, but don't read anything out loud.
>
> Q: Have you had an opportunity to review Exhibit 1?
>
> A: Yes.

> Q: [Take the exhibit from the witness.] Did reviewing Exhibit 1 refresh your recollection as to when the meeting with John Doe occurred?
>
> A: Yes.
>
> Q: When did the meeting take place?
>
> A: November 30.

There are some judges who, prior to allowing you to show the witness the document, might require you to ask the witness whether there is something that could refresh the witness's recollection. In our experience, this is unnecessary, and most judges before whom we have appeared do not require such an additional foundation question. However, as this type of requirement falls within the judge's discretion to control the mode of presentation pursuant to Rule 611 of the Federal Rules of Evidence, it is up to you to know your judge's preferences and to be prepared. Thus, when preparing your witness, you should go over the kinds of questions you might ask if he or she fails to recall a fact you have discussed during preparation.

Some additional practice points concerning refreshing recollection:

First, you should advise the witness to avoid absolutes in answering questions unless you are both 100 percent sure of the fact recounted; for example, the witness should say "I don't recall" instead or "no." Why? Because some judges might not allow you to refresh the witness's recollection if the witness answered categorically.

Second, you can also take steps to avoid this potential problem by using phrases such as "Do you recall," "Do you remember," or "To the best of your recollection" whenever possible in your questions. That was done in the sample questions above.

Third, when you use a document to refresh recollection, the document itself is not evidence. It should not be shown to the jury and should not be read aloud, either by the witness or the lawyer. That was the reason for asking the witness not to read Exhibit 1 aloud in the sample questions. However, under Federal Rule of Evidence 612, the opposing party is entitled to offer into evidence that portion of the document that was relevant to refreshing the witness's recollection.

Fourth, in the sample questions, the attorney retrieved the document from the witness before asking the relevant questions. The purpose was to avoid an objection that the witness's recollection was not refreshed and that the witness was simply reading from the document. That said, although we do not believe this step is necessary in most

courtrooms today as long as the witness does not appear to be reading from the document while answering your questions, it is one of those “can’t hurt” steps to ensure that an objection will not be forthcoming.

Fifth, anything can be used to refresh recollection—not only a document. It can be a recording, a picture, or, as one judge before whom we have practiced likes to say, a can of spaghetti.

Sixth, in terms of procedure, make sure to show opposing counsel anything you use to refresh recollection before it is shown to the witness, as may be required by the rules of evidence. Thus, if in this case the refreshing document had not been pre-marked and provided to opposing counsel before trial, it should be shown to opposing counsel before being shown to the witness, and you should note that showing for the record.

Finally, refreshing a witness’s recollection should be distinguished from past recollection recorded, a hearsay exception that is governed by Federal Rule of Evidence 803(5). That rule provides for the admission of a record concerning a matter the witness once knew but now cannot recall well enough to testify fully and accurately, was made or adopted by the witness when the matter was fresh in the witness’s mind, and accurately reflects the witness’s knowledge.

Refreshing Recollections Without a Document

But what if you don’t have a document or tangible object that would be likely to refresh the witness’s recollection about the date of the meeting? What else can you do? One option is to try to refresh the witness’s recollection by asking a series of tangentially related questions that might spark recollection.

For example, in our hypothetical, you could try the following types of questions, in no particular order of importance: Do you recall the day of the week on which the meeting occurred? Do you recall the time of the year at which the meeting occurred? Do you recall the year in which the meeting occurred? Did the meeting occur before Christmas? Assuming the witness says “before Christmas,” Did the meeting occur before or after Thanksgiving? Assuming the witness says “after Thanksgiving,” How long after Thanksgiving? Do you recall what you did on Thanksgiving? Do you recall what you did during the remainder of the Thanksgiving weekend?

Obviously, the types of questions you ask will depend on the answers that the witness gives. The point, however, is that, by asking a series of questions such as this, you may in this case spark the witness’s memory that the meeting occurred on the Saturday after Thanksgiving, November 30.

If those techniques are not working, another possibility is to use almost leading or leading questions. To do that and to avoid evidentiary objections, though, you should understand the concept of, and the law governing, leading questions and, more importantly, your judge's view of them.

A leading question is one that "suggests the specific answer desired." 3 WIGMORE, EVIDENCE § 769, at 155 (Chadbourn rev. 1970). Another commentator has written that "[t]he test of a leading question is whether it so suggests or indicates the particular answer desired that such a reply is likely to be given irrespective of an actual memory." CISSELL, FEDERAL CRIMINAL TRIALS, § 18-1, at 401 (5th ed. 1999) (quoting *United States v. McGovern*, 499 F.2d 1140, 1142 (1st Cir. 1974)).

A question that calls for a "yes" or "no" answer should not necessarily be viewed as leading. *Id.* (citing *DeWitt v. Skinner*, 232 F. 443 (9th Cir. 1916)). Rather, the test should be whether the question admits equally of a "yes" or "no" answer. If it does, the question is not leading. This was the test used by former Chief Judge John Bissell of the U.S. District Court for the District of New Jersey, and in our view, it is the simplest and most accurate test for determining whether a question is leading. In criticizing the view that a question calling for a "yes" or "no" answer is leading, Professor Wigmore wrote:

> Obviously such a question depends for its suggestion more in the tone of voice than in the form of words. The particle "not" (as in, "Did you not say that you refused the offer?") does indeed convey in itself the suggestion that an affirmative answer is desired; but the opposite form ("Did you say that you refused the offer?") by no means betrays in form such a suggestion, and depends almost wholly on the intonation for suggestion. In other words, it may or may not be leading. Similarly, a question may or may not be [leading] according to the amount of palpably suggestive detail which it embodies.

WIGMORE § 772, at 163, 164.

Nevertheless, leading is in the eye of the beholder, and some judges are more restrictive than Judge Bissell. Indeed, they may view any question calling for a "yes" or "no" answer as leading, especially if the question contains some of the facts to be elicited.

Using our hypothetical, consider whether the question "Weren't you at the XYZ Restaurant on November 30?" is leading. We think virtually all judges would find this to be leading. By contrast, and according to the test of Judge Bissell and many commentators, "Were you at the XYZ Restaurant on November 30?" would not be a leading question because it admits equally of a "yes" or "no" answer.

Of course, every judge is unique, and some may rule otherwise. If your judge is particularly restrictive in his or her definition of a leading question, you might try to reframe this question as follows: Do you recall whether or not you were at the XYZ Restaurant on November 30? Stern would argue that this question cannot be leading because the witness has a clear and equal choice. *See generally* STERN, ch. 11. (A tip for our readers appearing before judges who take a restrictive view of leading questions: The use of the words "when," "what," "where," and "how" is likely to result in questions that are perceived as non-leading more than questions that begin with the word "did" or "is.")

Put simply, you have to know your judge and be prepared to ask questions such as this in a way that will pass the judge's test of leading. But, if you are faced with a judge who takes a restrictive view of a leading question and your witness is not recalling what you need the witness to recall, you can also try to use the Federal Rules of Evidence to your advantage. (This is a good point at which to provide the following advice: All trial lawyers should know the rules of evidence. That knowledge can help you get important information into evidence, and it could help you keep harmful information out of evidence. Put simply, knowledge of the rules of evidence is an essential tool of the trial lawyer's trade.)

Rule 611(c) of the Federal Rules of Evidence provides that "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness testimony." The rule goes on to say that leading questions can be used on cross and when the witness is hostile, an adverse party, or one identified with an adverse party. FED. R. EVID. 611(c). Moreover, the comments to the rule explain some of the instances in which leading questions can be used to develop the witness's testimony. Among them are cases in which the witness is a child or an adult with communication issues; questions that relate to preliminary matters; and most relevant to our hypothetical, cases in which the witness's recollection has been exhausted. *See* FED. R. EVID. 611 advisory committee's note to subdivision (c). Finally, although not in the rule or the commentary, leading questions should also be allowed when the questions are foundation questions to establish the admissibility of evidence because, pursuant to Rule 104, the rules do not apply to preliminary questions of admissibility.

Therefore, if through your questioning you have shown that Jane Smith's recollection about the date of the meeting with John Doe has been exhausted, the judge should allow you to ask the witness whether the meeting occurred on November 30. (If that question is allowed, however, you should prepare for opposing counsel's argument that the fact finder should not credit the witness's testimony about the date of the meeting because the witness could not remember without counsel "putting the words in the witness's mouth.") Of course, even if the judge sustains an objection to that question, the witness's recollection will have been refreshed by the date embedded in the question itself. Thus, your next question should be "Do you recall the date of your meeting with John Doe?" Ms.

Smith will presumably have taken your cue and will answer, “November 30.” If she doesn’t, you likely don’t have a very good witness!

One final scenario. What can you do if, instead of saying that she does not remember the date of the meeting with John Doe, Jane Smith says that she recalls the date of the meeting and that the meeting occurred a week later, on December 7.

In this case, you can “impeach” your witness, which is authorized by Federal Rule of Evidence 607. Therefore, without going through the refreshing recollection foundation, you should be able to confront Ms. Smith with the fact that the meeting took place on November 30, and given that it is impeachment, you should be able to do it in a leading manner. Borrowing from the refreshing recollection scenario, assume that you have a piece of paper on which Ms. Smith wrote the date, time, and place of the meeting. You can show Ms. Smith the paper, establish that she wrote it, and establish that it reflects the date, time, and place of the meeting. You can then finish with something like this:

> Q: Ms. Smith, did the meeting occur on November 30?
>
> A: Yes.
>
> Q: Is it fair to say that you were mistaken when you said that it occurred on December 7?
>
> A: Yes.

However, please remember that if you need to impeach your own witness who has mistakenly testified, be gentle. Unlike the cross-examiner’s goal, your goal is not to destroy the witness’s credibility. So frame your questions in an understanding way to show that, on this particular fact, the witness was simply mistaken.

Redirect Examination

When it comes to redirect, your first decision is whether to conduct one at all. If your witness’s answers and credibility were not materially undermined by cross-examination, there is not much to be gained by delving back into the witness’s story and giving your opponent one more chance to attack the witness on recross-examination. Indeed, not permitting recross may warrant reversal. *Compare United States v. Riggi*, 951 F.2d 1368, 1374–76 (3d Cir. 1991) (a district court abuses its discretion when it prohibits all recross and does not allow recross on “new matters” raised in redirect), *with United States v. Calloway*, 2022 WL 989362, at *3 (3d Cir. Apr. 1, 2022) (unpublished) (where redirect

testimony does not raise a new matter, recross-examination is not warranted). Redirect is also limited to the scope of the cross-examination, and you remain constrained from using leading questions (though many judges are a bit more flexible on redirect). Thus, set your expectations for the usefulness of redirect accordingly.

Even so, generally you should conduct redirect (though please do not say that you will do so "briefly" or that you "only have a few questions"—it's never true). On cross, your witness may have been unable to give full explanations. Or your adversary may have focused on one part of an exhibit but overlooked other parts that are helpful to your case. Or your witness may have misspoken. These are all fairly straightforward areas for redirect. You may, through your questioning, even point out that your adversary was not really seeking the truth on cross-examination. For example:

> Q: Do you recall that on cross-examination you were asked about [a particular event]?
>
> A: Yes.
>
> Q: Do you also recall that you were not allowed to provide a full explanation of [the particular event]?
>
> A: Yes.
>
> Q: Are you able to provide the jury with a more complete explanation of [the particular event]?
>
> A: Yes.
>
> Q: Please explain to the jury now.

You also should use redirect to rehabilitate your witness and to respond to your adversary's lines of attack. Notwithstanding your advance preparation, your witness probably gave answers on cross that were (or appeared to be) unhelpful. Redirect is your last opportunity to use the witness to address these matters. Here again, preparation is key. From all the time and effort you invested to know your case and your witness, you should be able to anticipate the likely areas of your opponent's cross and how you would respond to them.

Two final items for redirect. Make certain to use the cross transcript if you have it available. Also, once cross-examination has ended, you can interact with the witness again

and potentially prepare the witness for redirect—though make sure to check the jurisdiction's law first.

As we have discussed in this article, we believe that solid preparation is the safest way to pave the way for smooth witness testimony. But planning can only get you so far. If and when things veer off course, we hope the tips and tricks in this article prove helpful.

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