

The Legal Investigator as a Trial Witness

Legal investigators belong out in the field gathering evidence, taking statements, documenting accident scenes and tracking down valuable witnesses. In most cases, they should not be on the witness stand in court. But there will be a time when there is no choice but to use them. That is when preparation is the key.

As good as they are at gathering evidence, investigators on the stand can easily put a civil case in jeopardy. Thanks to the stereotypical portrayal of private investigators in the media, a jury is likely to assume they used deception and dishonesty a la "The Rockford Files" to gather the information they're presenting. Or, the investigators could have gathered so much information that they become an easy target to the opposing counsel's probing.

"You never have a perfect client," says Palm Springs legal investigator Carl Reich. "Sometimes your own investigator will expose the warts of your client." He says the other attorneys can use cross examination to uncover facts or details that may be damaging to the case. "The more the investigator knows, the bigger the potential for problems on the stand."

Some attorneys attempt to limit the extent of knowledge of the legal investigators they use by having them focus their investigation on only one aspect of the case. It limits the opposition's ability to probe too deeply.

"It can be a trade off," says Reich. "On one hand I want to shake the attorney I work for and say, "give me more information to work with" but I realize there are trade-offs. If the other side's counsel tries to probe into other areas, I can simply say, "I don't know anything about that."

If there is no way of avoiding the court room testimony of legal investigators, they should undergo extensive preparation. They should know exactly what questions they'll have to answer from both sides. It is important to know exactly how the investigators will stand up to both friendly and more hostile questioning. The practitioner should run the investigator through the testimonial gauntlet regardless of the investigator's experience or the level of confidence the attorney has in the investigator. There should be no surprises when they're on the witness stand.

Because of the distorted view the general public has of "private eyes", the legal investigators must go out of their way to appear appropriately professional. Regardless of their income or success level, they should dress in a conservative yet comfortable manner. They should be well-groomed but not flashy. They should never appear to be better than or more knowledgeable than anyone else. The key is to not give the members of the jury any fodder for stereotyping. A decent haircut, some shoe polish and an air of competence and cooperation will go a long way.

But the most important job of legal investigators on the stand is to be and appear to be completely, 100 percent, without a doubt, absolutely honest. No exceptions. The members of the jury will quickly pick up on any words, gestures or omissions that seem to be less than truthful. That doesn't mean that an investigator won't accidentally slip up once in a while, after all, they're only human. "Most stumbles can be rectified," says George Michael Newman, a veteran legal investigator based in San Diego. "Juries are frequently sympathetic with human foibles, but they're intolerant of what they perceive to be trickery, deception or abject inability."

"There are attorneys who place investigators in a position wherein they are required to either lie or, by telling a truth destroy the case," Newman said. "These individuals should not be surprised when the issue blows up in their face."

The investigators should also have their files with them in court as a prop, but they should know with absolute confidence the contents of the material including notes, documents, diagrams, photos, even invoices.

In more than 20 years of trial work as both a prosecutor and as a defense attorney, Edward Consiglio says the investigators' notes are the key to effective testimony. "When they ask you, How do you know that?" you can confidently say, "Here are my notes. I wrote them down." It is not easy to question your memory when you've got good notes." Any reference to the file should be a manner of "pacing the response" not running for cover.

Legal investigators should lean toward concise responses to questions, responses that will instill confidence and credibility. They should make eye contact with the whomever is asking the questions, but they should then reply to the jury or to the judge if there is no jury. The more direct eye contact with these deciders of fact the more credibility.

Investigators should know how to answer questions while on the stand. While many lawyers coach their witnesses to keep answers as brief as possible, it is not a good idea to gravitate toward simple "yes" or "no" answers. It might be necessary to give a brief explanation of the simple answer or to maybe indicate that what the witness is providing is accurate "to the best of my ability or recollection."

But the witnesses should never volunteer additional information, examples or anecdotes. It is only human nature to want to provide more details, but it is a dangerous trap. The investigators must trust that the attorneys who hired them have a plan and know where they want to go. It is a good time to remember the old adage, "Just the facts, Ma'am."

The area of greatest risk, however, is when the opposing attorneys get to question the legal investigator witnesses. Opposing counsel will be doing everything possible to undermine not only the facts presented, but also cloud the image of the investigators. And sometimes the witnesses inadvertently cloud their own images. They do it by changing their demeanor in front of the opposing counsel. It can be as subtle as body language that says, "You're the enemy. I don't want to cooperate with you." It can be answers that are less complete. Or it can be outright rudeness or aggression. Any such display of loyalty to one side is likely to doom the effectiveness of the testimony maybe the entire case leaving the impression the legal investigator is nothing more than a "hired testimonial gun".

Investigators should testify truthfully to what they preserved, saw or heard. If they attempt to manipulate the way the trial turns out, they're going to telegraph their bias to the all-perceptive jury. Of course, the investigators want their side to win, but they shouldn't embellish.

Finally, legal investigators must be careful to not allow opposing counsel to provoke them. There is never an advantage to arguing with an attorney even an attorney who is doing everything possible to discredit the investigator. It's okay to be incredulous that someone would question the investigator's honesty, but it is not okay to roll up the sleeves and start swinging.

To be safe, lawyers should keep the investigators in the field. If they must appear in court, the wise lawyer reduces the risk of unwanted problems by planning well and by properly briefing the legal investigator.