My FIRST YEAR *as a* LAWYER

Real-World Stories

from America's Lawyers

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When Honey Is Better than Vinegar

MARLON A. PRIMES

An elderly man, the day's witness, sat quietly. He was watching the arrival of two lawyers: Mr. Jones and me.

As Mr. Jones, his attorney, and I, the opposing counsel, entered the conference room, the man looked up apprehensively. He was polite and friendly but clearly nervous about the impending deposition. I smiled and greeted him perfunctorily but didn't go out of my way to make him feel comfortable. I myself was nervous and preoccupied with how I would perform in this, my first experience in questioning a witness in a formal proceeding.

Like any other neophyte, I had grossly overprepared, spending weeks reading and rereading the voluminous medical records, accident reports, and applicable codes from *Rules of Civil Procedures*.

I was determined to conduct a thorough deposition and not permit Mr. Jones, who had been practicing for decades, to run over me. Even though partners at the large general-practice firm where I worked told me thet were too busy to provide me any guidance, I had participated in moot court in law school and

watched instructional videos on how to question a witness. I was going to be tough. I was about to learn, however, that toughness in a legal arena, as in life, must be tempered with humanity.

The witness was sworn in, the court reporter nodded her readiness, and I began barking out a battery of questions.

I started by questioning the witness about what he did for a living, his medical history, and his family life—all background questions that lawyers get out of the way early when examining a witness. The man's answers were responsive, and he had no difficulty understanding my queries. His attitude was helpful and the answers frequently were more expansive than I wanted or needed. However, I preferred a talkative witness to a taciturn one.

Once I had gotten the simple stuff, I eased into questions surrounding the car accident that had fated the lawyers, witness, and court reporter to be there that day. The inquisition now centered not on the witness's personhood but on his actions and perceptions and weather conditions the day of the accident.

"Where were you going?" I asked.

"I was making a delivery," he answered, explaining that he was assigned the task while he was in the middle of performing his regular duties at his job. Further exchanges established that the roads were slick and the visibility bad that day.

"Did your employer require you to get the delivery done within a specified period of time?" I probed.

"Yes."

"So you were in a rush, right?" I asked rhetorically, and, inwardly, triumphantly. I was confident that I was on my way to establishing that the accident resulted from the defendant's negligence and not my client's failure to post warning signs at the construction zone where the accident occurred. Yes, things were going well and I was smug about my ability to elicit information from this witness.

I noticed that across the table, the courtly Mr. Jones, who I guessed was about sixty, looked suddenly troubled. Till now, he had said little and objected not at all to my questions. Now he was fidgety and alert. I felt a twinge of foreboding as his face took on the mien of a boxing champion barely hanging on to the ropes after a barrage of surprise punches.

Before I could score a knockout by eliciting damaging information that would highlight the plaintiff's own negligence, Mr. Jones abruptly, and most rudely, I thought, disrupted what had been an orderly proceeding in a voice brimming with apparent annoyance and indignation.

"There is no way my client can remember that fact," he said, as if he had just that second succeeded in insinuating his own mind into the witness's consciousness.

I was flustered and sternly told Mr. Jones he should not interrupt. "Let the plaintiff answer the question himself," I demanded. "If he does not know, then he alone can say so."

I resumed my questioning. Almost immediately, Mr. Jones, seeing that I was already testy, provoked another argument, this time about the length of the deposition.

"Come on, get along," he said. He seemed to be belittling the significance of my time of questioning in the same way one might dismiss a waif from an imperious presence.

I exploded. I informed Mr. Jones that I was seeking to ascertain relevant issues and that sanctions could be sought for inappropriate conduct at depositions. As if he didn't know.

"We're conducting this deposition pursuant to Federal Rule Twenty-six," I said angrily. No judge would allow a lawyer—not even Mr. Jones—to act in such a way in a courtroom, and I was not about to brook such behavior in one of my cases. Furthermore, the deposition hadn't taken more than an hour, well within reasonable time limits.

I continued contentiously. "I'll take as long as I need," I yelled at him. I had lost my composure.

My threats seemed to temper Mr. Jones's nasty mood, but it became apparent that his outburst had had an effect on the witness, who now was distinctly uncooperative. For the remainder of my questioning, the witness's memory was mush. At times he glared at me if he didn't like a question and his answers became monosyllabic and curt. The witness now observed the cardinal rule that a hostile witness respond literally to a question and give no more or less than is asked for.

About a week later, Mr. Jones and I met again at a deposition at which he would examine one of my witnesses in the same accident case. Amazingly, Mr. Jones's personality had undergone a metamorphosis for this proceeding. Before the deposition, Mr. Jones politely told the witness, my client, "I am only trying to get at the truth. I hope I don't have to keep you here for very long."

My opposing counsel was no longer the boorish ogre who had attempted to ruin my deposition. He was now playing the part of the amiable gentleman, who was simply trying to ensure that justice was rendered fairly. I thought I was going to be sick watching Mr. Jones flash that wry smile, with all the sincerity of a fox entrusted with guarding a henhouse.

My opponent's strategy worked like magic. My client showered Mr. Jones with generously detailed responses, even though I had instructed him on the cardinal rule. The newly sincere and placid Mr. Jones got much more information than he would have had he resorted to being boorish. In fact, I realized that the minimal civility I had shown his client in the first deposition was no match for the measured dose of compassion and zealous humanity he now visited upon my client.

It hit me: At the first deposition, Mr. Jones had triggered a

screaming match in order to drive a wedge between his client and myself.

Later, Mr. Jones really showed his experience when settlement negotiations got under way.

While we were talking on the phone, Mr. Jones said, "Marlon, my friend, I am only trying to be reasonable. I think this offer is fair for all sides." He then sighed and said, "Let me tell you a story. You never can tell what juries will do with the facts. I had a case where I thought my client was not liable. You know what the jury awarded? Twenty thousand dollars. Therefore, we should settle this matter and take away the guesswork," he said. "It will help both of us," he insisted gently. Boy, was he a pro. I felt like he was suckering me, but he was so nice about the whole thing!

We eventually did settle the case. After reflecting on my experience with Mr. Jones, I realized that important lessons could be learned from our various encounters. For instance, while Mr. Jones's attempts to disrupt the deposition were to me reprehensible and probably unethical, I had no excuse for losing my cool. I resolved to keep my composure under difficult circumstances, no matter what the opposing lawyer might say. Furthermore, Mr. Jones, in his kindly handling of an opposing witness, demonstrated to me that being friendly and tender with witnesses can pay dividends. One need not always be confrontational with a witness from the other side. Lastly, Mr. Jones's amicable approach to settlement negotiations helped me focus on how and whether I could best help my client by settling the case. Although I didn't believe for a second that Mr. Jones was being altruistic, his calm approach made me more willing to resolve the dispute.

An author in the *Daily Legal News* and *Cleveland Recorder* recently asserted that the practice of law is one-third legal knowledge, one-third common sense, and one-third negotiating and social skills. I

agree wholeheartedly with this statement: How unfortunate it was that I had to learn its accuracy on the job. I have no doubt that had Mr. Jones and I not gotten into a screaming match in the first deposition, I would have been able to retain the cooperation of his client. However, a lawyer also must know when to bear down—or perhaps even lightly bully—a witness in order to elicit helpful testimony. The trick is getting to know what tactics are needed to win over different people. Hence the importance of social skills.

As a result of the entire ordeal with Mr. Jones, I learned the hard way that one often is more successful using honey than vinegar. In fact, recently during a tense moment at a settlement conference, I took a page from Mr. Jones's book. I patted a young attorney on the back and said, "Let me tell you a story, my friend."

And the rest is history. Thanks for the lesson, Mr. Jones.

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