

Getting the Information You Need

Eliciting Information, Asking Questions, Listening to Answers & Assessing Credibility

Imagine a district court judge hears the following testimony in the cases below. How will that judge rule?

Example #1: In a failure to pay rent/SE action, the LL testifies as follows:

Jackie has rented from me for 8 months now. It's a month-to-month lease, and the rent is \$850/month, due on the first. She missed the rent on May 1st, but I gave her until June hoping she'd catch up. When she missed June rent too, I filed this lawsuit.

Example #2: In an action to recover personal property, the plaintiff testifies as follows:

When I came home from work and got ready to mow my lawn, I couldn't find the lawnmower. Turned out, the defendant – my neighbor – had come got it and loaned it to his brother way across town. We had words about it, and now he's refusing to go get it and return it to me.

Example #3: In a SE action based on holding over, the plaintiff testifies as follows:

I filed this lawsuit because Lilibet has refused to leave. I told her she couldn't go on staying there without paying me something, but she says she doesn't have any other place to go.

Remember when we talked about what happens when a plaintiff fails to establish a prima facie case as to each essential element? How does that apply here?

What does this mean in terms of how you hold court?

What's your response to the objection that you're not objective – you're helping the plaintiff, to the detriment of the defendant?

Do you believe that you are entirely consistent in the frequency, number, and phrasing of questions you ask in court? ____ Yes ____ No

Relevant law:

G.S. 8C-1, Rule 614. Calling and interrogation of witnesses by court.

(a) Calling by court. – The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by court. – The court may interrogate witnesses, whether called by itself or by a party.

(c) Objections. – No objections are necessary with respect to the calling of a witness by the court or to questions propounded to a witness by the court but it shall be deemed that proper objection has been made and overruled.

How to ask a question designed to elicit truthful information:

- Avoid suggesting the desired/expected answer in the question:
“And you made demand?” vs. “Did you and the defendant have any communication after he missed that payment? . . . Tell me about it.”
- Use a series of questions if necessary, beginning with a very broad inquiry and becoming increasingly more detailed until you get the information you’re looking for or decide it’s most likely not there.
“Tell me about that lawnmower.” “How did you come to have it?”
“Did you buy it yourself?” “Are you the owner?”
- Slow your pace of questioning down to give the witness time to think about the answer and phrase the reply. Rapid-fire questioning is not a tool used when a careful, accurate response is desired. This is especially important when the witness is very nervous.
- Similarly, silence is a powerful tool. If a witness’s response to a question is uncertain or too brief, pausing will often produce additional information.
- If a witness has become confused or you have concerns that the witness may have been intimidated by an aggressive cross-examination, ask clarifying follow-up questions, again with a slower pace, to ensure that the witness understands and stands behind the testimony given. This concern arises out of the fact that leading questions are permitted on cross examination, which sometimes is and sometimes is not helpful in ascertaining the truth.
Example: The witness has just responded “yes” to a leading question containing legal terminology and/or a legal conclusion. If you have concerns that the witness responded without actually understanding the question, it is appropriate for you to ask follow-up questions before reaching conclusions about the weight and validity of that testimony.
- Use reflective listening, but with care.

Reflective listening is useful in signaling understanding, but it can also signal agreement, and so must be done thoughtfully. A reflective statement is sometimes especially useful to soften the harshness of redirecting a witness to provide relevant information. In a case involving the death of a pet, for example, consider the difference between saying, “It sounds like you really miss Rover,”—which is likely to produce tears and additional testimony along the same lines -- and “I know losing Rover was hard for you, and you mentioned you had vet bills as well. Could you tell me about those?” In a different circumstance, you might simply elicit more information by saying, “So you paid for the car and then?”

Notes on Effective Listening

Assessing Credibility

Some of us are better than others at knowing when someone else is lying – and some of us are better than others at knowing that virtually all of us are not very good at this at all.

For this reason, scholars who have pondered the problem of judicial officials routinely having to make decisions about witness credibility have come to one consistent conclusion: even a little bit of corroboration significantly improves the odds of a correct assessment.

Nevertheless, there are a few guidelines that may help when the decision in a case comes down to deciding whether the plaintiff is probably telling the truth.

1. Coming in at #1 is the existence of written corroborative evidence, particularly that created in the ordinary course of business and/or at or near the time of the event in question.
2. The degree to which the proffered evidence is internally and historically consistent with the story told by the witness.
3. The degree to which the proffered evidence is consistent with evidence offered by others, helping to build an overall narrative that makes sense and seems likely.
4. The degree to which the witness had reason to be attentive and was in a position to observe the events in question.
5. The presence or absence of motivation to lie.
6. The witness’s ability to answer questions related to details of the event, particularly questions that the witness might not be expected to anticipate.
7. Sometimes—but not always-- the absence of evidence is itself evidence.
8. Demeanor is frequently cited but is last on the list for a reason.