

CIVIL DISCOURSE

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Spring-Summer 2023

UPCOMING CLE EVENTS:

New Jury Selection Rule
Changes-September 20, 2023

Trial Institute-October 2023

HANDLING AN EVASIVE WITNESS

By Vince Parrett, Kilpatrick Townsend & Stockton, LLP

It's human nature for witnesses to try to evade answering your questions that make them look bad or undercut their case. This happens all the time in the courtroom and in depositions when an adverse witness tries to reframe your question by saying something like this—"Well, if what you mean by your question is X, then the answer is Y," thereby answering a question that you did not ask.

With so many examinations now being done remotely by Zoom, witnesses seem ever more emboldened to try this tactic of reframing your question and answering a different question. Even worse, this evasion tactic can strike fear in a new lawyer, and for good reason. What do you do when you are at deposition or in court with a jury watching, and the witness just won't answer your question?

In my experience, two intertwined techniques work well here:

- First, in your question, use plain language that contains only one fact or proposition that compels the witness to answer "yes" or "no." If your question is not plain and to the point, then you're giving the witness the opening to feign confusion and give you a long answer on other points that hurt your case.
- Second, politely repeat your question until the witness finally answers your question or the Judge intervenes and directs the witness to answer. You are entitled to an answer on the record to the question that you asked. The witness does not get to answer a question that you did not ask. And the witness will have plenty of time to answer all the questions that you did not ask during their re-direct examination by their own counsel.

Regarding the related point of whether and when you should ask the Judge to instruct the witness to answer, timing matters. Some lawyers make the mistake at trial of immediately asking the Judge to step in and instruct the witness to answer their question. But there are two problems with that: First, you may appear weak to the jury, needing the help of the Judge. Second, and perhaps even more damaging to your case, at times during a long jury trial even the best Judge might conceivably not be listening closely

to every question asked, so if you confront the Judge with a sudden demand to "instruct the witness to answer," the Judge might react with a swift—"Overruled. Move on counsel." And then you're stuck.



Instead of too quickly asking the Judge to help you, politely repeat your question to the witness; that repetition will get the Judge's attention and the jury's attention. And if the witness does not answer and you need to repeat the question a third time, then the Judge may grow impatient with the witness. Remember that the Judge wants to move the trial along, and witnesses who don't answer questions can really stall a trial's progress. Consequently, after your third attempt, the Judge will usually admonish the witness: "Answer the question." And then instead of getting one victory, you get two—the witness is forced to answer your question, and the jury sees the Judge taking appropriate action for your side and not the witness's.

So a simple yet effective practice tip when an evasive witness does not answer your question is to repeat the question until the witness does answer it. That's all you have to do. Unfortunately, some attorneys do not do this and instead will get angry, raising their voice to argue with the witness, which confuses the jury and makes everyone forget the original question asked.

In the end, by patiently and politely repeating your question to an evasive witness, you will you get your question answered and advance your case. For each time you have to repeat a simple question to an evasive witness, the jury will grow more and more impatient with the witness's evasion—and view you as the voice of reason and the witness as unreasonable. And that's how you win the credibility contest with the witness, which, after all, is the point of cross-examination.

ChatGPT Gets Colorado Attorney in Hot Water Over Fake Cases

By Adam Juratovac, Juratovac Law

In March 2023, I used ChatGPT to help draft a mediation brief for civil litigation having to do with property disputes. If I submitted that mediation brief, I would probably be subject to disciplinary actions from the state bar. At the very least, my credibility would have been ruined for years.

ChatGPT is an advanced language model developed by OpenAI (Read: It is an artificial intelligence platform). It is designed to understand and generate human-like text based on the input it receives. ChatGPT has been trained on a vast amount of diverse data from the internet, including books, articles, and websites, allowing it to generate coherent and contextually relevant responses to user prompts. Artificial Intelligence models can analyze vast amounts of legal information, identify relevant cases, and even generate draft motions. However, there are limitations of ChatGPT that require users to cautiously and critically scrutinize any text it produces.

Earlier this week, a second-year Colorado attorney is making headlines in his first civil litigation case. The attorney was defending a client accused of breaching a car payment agreement. That Colorado attorney prepared a motion to set aside a summary judgment. According to news reports, this attorney admitted that this was the first motion he had ever researched, drafted, and filed by himself.

This attorney used ChatGPT to draft the motion. This attorney did not check the cites in his motion that ChatGPT created. On the day of the hearing, the Colorado attorney began checking his citations and noticed that several were not real. Once informed of his citation blunders, the Colorado attorney admitted his fault. However, the damage was done.

The Colorado attorney is not alone, in May 2023, a New York state attorney submitted a federal court filing that cited at least six cases that don't exist.

Going back to my mediation brief, I used ChatGPT to help research relevant cases. ChatGPT provided me with relevant cases and case summaries. After I received those case summaries, I queried ChatGPT to "prove it" and provide me with all of the case citations. ChatGPT confidently coughed out the citations for the cases it summarized.

Three weeks before my brief was due, I reviewed cases it referenced. Out of the more than 10 cases I used from ChatGPT's query, all were fake. None of them were real.



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The Civil Practice Committee discusses issues of mutual concern between the bench and bar. Membership is open to any member of the Santa Clara County Bar Association. The Committee meets every first Monday of every month except July and August.

Contact Us

Civil Practice Committee

Santa Clara County Bar Association

P.O. Box 26457

San Jose, CA 95159

sccba.com
