

# American Board of Trial Advocates™



## Washington Chapter Newsletter January 2024

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### PRESIDENT'S MESSAGE



Dear Members,

Planning for 2024 is well underway. We are bringing back some of our most popular events, such as the Judicial Reception with the Federal Bar Association and our

Masters In Trial program. We are also planning some new programs, including the voir dire competition on February 24th (more information below) and regional social gatherings across the state.

Several members of the Executive Committee are headed to Biloxi, Mississippi this week for the ABOTA National Board Meeting and Leadership Conference. This meeting is a chance for us to network with other chapter leaders, as well as finalize our strategic priorities for the year. I'll provide a recap of the meeting as well as more information on our Chapter initiatives for the year in the next newsletter. Have a great month!

Sincerely,

Eron Z. Cannon

### **VOTE FOR NEW MEMBERS**

You should have received an email last week with a link to vote for our new member candidates. If you have not already done so, please [CLICK HERE](#) to access the ballot. **Please submit your votes by February 2nd.**

All candidates have been vetted by the Executive Committee. An affirmative vote of at least 75% is required.

### **FREE CLE**

The ABOTA Foundation hosts a free CLE each month. [Click here](#) to see the list of upcoming topics and dates, as well as to access recordings of all past seminars.

If you are interested in receiving CLE credit for viewing the recorded programs, please contact Nicole at [nicole@wa-abota.org](mailto:nicole@wa-abota.org).

## CIVIL TRIAL TIP OF THE MONTH



This month's tip is from **Judge Rhonda Laumann**. Judge Laumann was elected to the King County District Court bench in 2018. Prior to that she served for six years as a pro-temp judge in King, Kitsap and Pierce counties. Judge Laumann practiced in both civil and criminal law and teaches trial advocacy at the National Institute of Trial Advocacy and the University of Washington Law School.

### **Effectively Using Exhibits to Refresh a Witness's Recollection or Impeach a Witness**

Credibility with a jury is paramount to effective trial advocacy. A universal way for an attorney to show their courtroom competence, translating into credibility, is mastery of the mechanics of the courtroom. Confidently handing exhibits to refresh a witness's recollection or impeach a witness are skills that seem difficult but are easily broken down into steps that are repeated, over and over. When done correctly, refreshing a witness's memory or impeaching a witness's testimony provide some of the best courtroom drama to help you win your case.

Areas where many attorneys struggle is skillfully using exhibits to refresh recollection and impeachment. While the underlying purpose of each of the tools is different, many attorneys confuse the steps necessary to effectively use either tool. Refreshing recollection means that you are using some collateral source (eg, deposition, report, statement) to help a witness refresh their memory on a detail that they have currently forgotten while testifying at trial. The primary purpose is to assist the witness in completing their testimony. Impeachment is using a collateral source (eg, deposition, report, statement) to demonstrate to the jury that a witness's testimony today is different from previously provided testimony/information. While one can also impeach their own witness with a prior consistent statement, the underlying purpose remains the same.

When refreshing recollection, an attorney is usually examining a witness who has forgotten an important detail in the witness's testimony, derived from another source. The steps necessary for refreshing recollection are as follows:

1. The witness must indicate they do not remember the answer to your question;
2. That there is something that would help them remember;
3. That they can identify what was created previously by them, or by another, and they have reviewed the information;
4. They recall creating that document or reviewing that document before court; and
5. That reviewing that document would refresh their recollection.

The attorney has the clerk mark the exhibit (or it may be pre-marked). The exhibit is shown to opposing counsel, then the witness. The witness is directed to review the exhibit until their recollection is refreshed, then to turn the exhibit over when they are finished reviewing the exhibit. The attorney asks the witness whether their recollection has been refreshed, then ask the original question again. Hopefully, the witness says yes, so that they can testify regarding the information in the exhibit that they just reviewed. If not, you may need to repeat all your steps!

When impeaching a witness on a prior statement, the attorney needs to follow the three C's – Confirm, Credit, and Confront. Confirming means the attorney is confirming the precise statement that there is a known prior inconsistent statement. Examples of locking in a witness's testimony are "Are you telling the jury X "or "Was your testimony on direct X?" The witness will likely confirm the trial testimony. When you are confirming, be careful to use the exact language of the witnesses. Attempting to change the witness's testimony will make you look either like you were not paying attention on direct, that you are trying to be a sneaky lawyer, or you are attempting to bully the witness.

Crediting means you give the same weight and gravitas to the source of the impeachment material, such as a deposition or statement. Attorneys tend to rush over the crediting step, to jump to the AH-HA moment of confronting. However, skimping on crediting actually takes away from the power of your ultimate confrontation. When crediting the prior statement, be sure to follow all of the steps! These steps may differ slightly, depending on the source of the impeachment exhibit. Consider the type of scene that needs to be set (the conditions surrounding the original statement that give the prior statement credibility) when considering crediting questions.

For this example, a deposition will be used. First, the attorney asks the witness, "You and I have talked about this topic before, correct?" or "This is not the first time you and I have talked about this topic, right?" Then, set the scene of the deposition process, by asking short questions to elicit "yes" answers:

"You gave a deposition on X date?";

"Your lawyer was there?"

"I was there?"

"A court reporter was there taking down everything we said?"

"The court reporter gave you an oath?"

"That oath was to tell the truth?"

"That is the same oath you gave today, right?"

"At the deposition I asked questions"

"You answered those questions"

"You wanted to tell the truth"

"You wanted to be accurate"

"You wanted your testimony to be complete"

"After the deposition was done, a transcript was created of your testimony?"

"You were given a chance to review that transcript"

"You were given an opportunity to make any corrections."

"You did not make any corrections. "

To confront the witness with the prior inconsistent statement, a copy of the deposition is handed to the witness. The attorney tell the witness to silently read along, directing the witness's attention to a specific line and page. The attorney reads the inconsistent statement out loud. This is very important. Do not ever hand over control of the exhibit to an adverse witness. Do not have the witness read the specific statement. The proper procedure is to read the inconsistent statement, then ask Did I read that correctly. Did I read that correctly is the only question the attorney asks the witness. Do not ask them to

explain, do not ask why the testimony is different today, do not ask whether they were lying then or are they lying now.

Make sure to pause for a moment, to allow the jury to absorb the fact that the witness has just given an inconsistent statement. The jury needs a moment to document the inconsistency in their notes. Many jurors do take notes and cannot write as fast as attorneys speak. Illumination of that inconsistency should be given its own time and space for the jury to consider the implications of the inconsistency. Please be sure that the inconsistency is an actual inconsistency, eg, the light was red/the light was green. Quibbling lawyers who split hairs over non-central issues are not juror fan favorites. Show the difference, when it makes a difference.

Good luck in your quest for excellence!

### **VOIR DIRE COMPETITION**

The Washington Chapter is hosting our first annual “Best in Washington” voir dire competition. Teams from all three Washington law schools will compete in a one-of-a-kind voir dire competition that focuses on the undertaught art of jury selection. Using real potential jurors, teams will put their voir dire skills to the test as they build the best jury for their side.

The competition will be held on **February 24th** at the University of Washington School of Law (William H. Gates Hall Room #138) beginning at 8:30am.

**We are looking for sponsors to help cover the costs of jury recruitment, juror pay, and the awards luncheon. Sponsorships of \$1,500 to \$2,500 are available. [Click here to view the sponsorship offerings](#). Please contact Nicole at [nicole@wa-abota.org](mailto:nicole@wa-abota.org) with questions or to sponsor. Sponsorship commitments are requested by February 12.**

Help us make this new program a success!

### **ABOTA - CIVIC LEARNING COUNCIL**

The CLC-ABOTA Civic Education Grants program continues to be a success. They have given nearly all of the money donated last year and have several grants pending approval of additional funding. A grant from the ABOTA National Foundation for \$5,000 has been approved and we expect to receive the funds in the spring. The Washington Chapter will take up a vote on funding at a future meeting as well. This program is a

great example of ABOTA dues dollars and Foundation contributions at work in our state, and we are proud to continue to support this program.