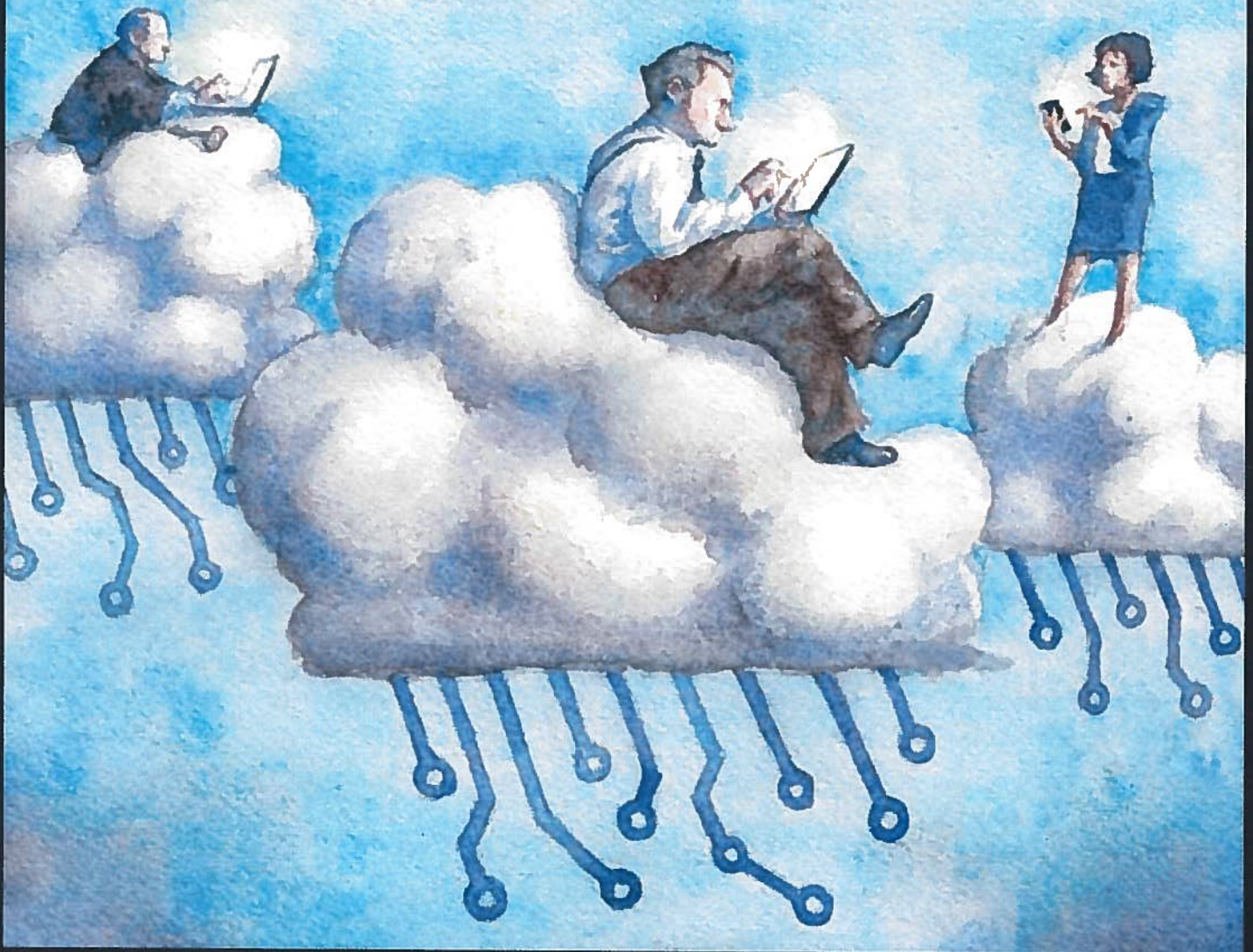


Litigation

AMERICAN BAR ASSOCIATION

THE JOURNAL OF THE SECTION OF LITIGATION



Data, Documents, and Decisions



A Road Map for Document Preservation

Arbitration for the Trial Lawyer

The Ethics of Joint Representation

Asking one fact per question gives the witness little wiggle room. Also, getting several “yes” answers puts the witness in the habit of agreeing with you and establishes a smooth, confidence-inspiring rhythm. But resist the temptation to finish your point with one question too many, such as, “So, you aren’t sure what you saw?” Chances are the witness won’t agree with you. And you don’t need to ask that question because you can argue that

hired gun. Of course, you won’t ask, “So, you’re a hired gun?” If you do, you’ll get a “no” answer and an objection. You’re better off asking the following questions:

The defendant retained you?

To give an opinion in this case?

The defendant is paying you \$450 per hour?

That includes your testimony today?

Point made. Move on to the next point.

And remember to end on a high note, too.



conclusion in closing argument based on the points you already established.

How should you start your cross-examination? Avoid spending the first minute introducing yourself, asking the witness to speak up if a question is unclear, or exchanging pleasantries. This is wasted time.

Instead, politely launch right into your cross. Start on a high note with a positive point the witness can’t refute. If you’re cross-examining a defense expert, maybe your first point is that the expert is a

That way, the last thing the jury remembers about your cross-examination is that the witness agreed with you.

What about the evasive witness who won’t answer your specific question? You could ask the judge to instruct the witness to answer your question, but the jury might think you’re a tattletale. Consider this approach: If the witness goes off on a narrative tailspin about his cruel supervisor when you ask “You were asked to resign?,” repeat your question, verbatim. If that doesn’t work, politely say, “I’m sorry,

sir, maybe my question wasn’t clear,” and ask the question again, verbatim. If that doesn’t work, ask: “Is that a ‘yes?’” Or: “I’m sorry, sir. I’m confused. Were you asked to resign or not?” No matter what, don’t give up, and always be polite because juries don’t like disrespectful lawyers. Even if the witness doesn’t answer your question, you’ve won because the jury will see that he is being evasive.

Finally, remember the old saying: Quit while you’re ahead. Although it’s tempting to press ahead when things are going well, once you’ve made your major points, sit down! Don’t risk eliciting damaging testimony and weakening the strong points you made.

With these tips and a little luck, you’ll lead the way to a winning cross. ■

TRIAL PRACTICE

The Next Step?

CHIP BABCOCK

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The lawyer considered his next step but hesitated. It was dark, his eyesight was failing, and he feared there was a curb hidden beneath the snow. If he stumbled and fell, he wondered, could he get an ankle replacement to go with his hips and (left) knee? Plus his hearing was failing. “I might not hear the snowplow and might get run over,” he thought.

It occurred to him, and not for the first time: “Should I still be trying lawsuits?”

He weighed the pluses and minuses. First of all he loved it! Simply loved it. He never felt more alive than when he was in the courtroom. And so far, judging by results, he was still at the top of his game. Jurors loved him, and his cross was still sharp—at least it felt that way to him.

But there was the time commitment. He had always prepared, prepared, prepared. Was there more to life than 2,400 billable hours a year? What was he

missing? And sometimes in the courtroom, he missed words because of his hearing and had to squint to see demonstratives on the screen. Was he hurting his clients?

He recalled a conversation (actually two) with trial lawyers who had confronted the question he was now metaphorically considering: the next step. He ran into one of those colleagues at a college reunion. That lawyer was two years younger, trim, and in excellent health, and he had retired two years earlier from a large New York firm. "I was at the top of my field," the retired lawyer said sadly. He missed being in the game. "What I said mattered. People paid attention to me. I was relevant!! But now I don't know. My phone doesn't ring anymore; I can tell you that."

Another conversation was with a world-class trial lawyer who was forced to retire by his firm. "I want to stay in the game," he said, "but I'm not sure how. The kind of trials I was involved in require a lot of support, and I just don't have that anymore." His firm had a pension (good) and a non-compete (bad). This conversation, thousands of miles from the first one, had the same theme: "Tell me how I can stay relevant," he pleaded.

The lawyer continued to think. The Dave Matthews song "Under the Table and Dreaming" ran through his head. How healthy is it to have your whole being wrapped up in your career, the lawyer wondered. If I quit and it doesn't work, could I go back? Should I do it until I keel over? What if I am slipping in the courtroom? Who is going to tell me?

Back when the lawyer was a young associate, the head of the firm's trial section took him aside and said, "You know, I am going to rely on my partners to tell me when I have to quit." The young lawyer experienced a thrill as he was almost up for partner. Years later, the thrill was gone when he and other partners had to tell this lion of the bar that his days



were over. A month later the lawyer died in the office.

But the lawyer also recalled more uplifting stories. A legendary trial lawyer at the firm, full of zest and life, one day happily declared that he was quitting and that he and his wife were going to travel the world, which they did, for five years, before he died. Another partner is still going strong, trying complicated lawsuits now well into his seventies.

The lawyer thought about this all the time. His firm was no help; it had no mandatory retirement age. In the end he decided to kick the can down the road. "I'll look at this again in three years," he told himself, and he took the next step.

He looked down again at the curb. He navigated it perfectly because he worked

out religiously. He felt strong and invigorated. After all, 65 is the new 40, he reminded himself.

Most of this tale is taken from real-life conversations and experiences, though I am not the lawyer pondering retirement (I still have both original hips and knees). But "the next step" is a topic bedeviling many of my friends and colleagues. There is no right answer, of course, and it would be presumptuous to offer everyone the same advice. Except for this: Take the next step with vigor and confidence, and clear that curb. A snowplow may come barreling down the street at any minute. ■