

Beyond The Truth, The Whole Truth and Nothing But The Truth: Witness Preparation for Modern Litigation

by Todd E. Betanzos

It is 1:00 p.m. on a Tuesday. An underwriter from the Dallas office of ACME Insurance Group is sitting in a conference room at the law offices of Earnest, Loyal & Well-Intentioned, LLP. ACME is the defendant in a coverage lawsuit filed by its insured, SealCoat, a manufacturer of coatings for use in the construction and landscaping industries. The underwriter's deposition has been requested because a dispute arose between ACME and SealCoat over the applicability of an exclusion in the policy that was asserted by ACME in its denial of a claim under the policy. The underwriter's deposition is set for two days from now, and the witness and her attorney have finally found time to meet in order to discuss her upcoming deposition.

The witness-to-be is anxious about having to answer questions under oath regarding her underwriting of the account five years earlier. That said, she thinks she'll be okay because she's committed to telling the truth and she's given a deposition once before. The attorney has a 10 inch stack of documents, including emails between the witness and the wholesale broker, the policy in question, and other documents from the underwriting file. He'd like to review these materials with his witness, but since the underwriter has seen them all before he thinks it's simply a matter of refreshing her memory a bit about the documents so she isn't caught off guard when opposing counsel asks her about them. Among other things said during the meeting, the following dialogue ensues:

Todd Betanzos is a Senior Consultant with American Jury Centers. Mr. Betanzos specializes in the preparation of key witnesses for testimony and the development of juror-focused trial themes, strategies and tactics based upon carefully tailored focus group and mock trial studies. He is a contributing author of Witness Preparation: a manual for attorneys (Campo, Simon, Betanzos; CreateSpace 2011). This paper contains distilled versions of many of the lessons taught in that text. Additionally, Mr. Betanzos is an AV rated attorney and mediator who maintains a diverse national trial and dispute resolution practice with the Dallas, Texas law firm of Tillman Betanzos LLP.

Witness: "I'll be fine. ... I've testified before. ... All I have to do is tell the truth."

Attorney: "Be sure to listen to the question. ... Only answer the question being asked. ... Don't volunteer anything. ... Don't guess or speculate. ... If you don't understand a question, make the lawyer ask it again."

Unfortunately, too many attorneys attempt to prepare witnesses for important testimony simply by giving them these basic guidelines, without teaching them *how* to employ them or helping them to find the right language to tell their truth. Similarly, far too many attorneys don't think carefully in advance about how the witness's anticipated testimony will fit within (or, more importantly, support) the larger framework, thematic development and theory of the case. To be clear, in the vast majority of cases this has nothing to do with how much the attorney in question cares about either the case, his client's interests, or how well the witness will handle the examination. Most attorneys care a great deal. They just happen to be busy, responsible for every aspect of the case, and – very often – are stuck in what has become an outdated perspective on deposition discovery. The problem is not that a witness cannot pick up something from a compressed, lecture-based testimony preparation session. It is that nobody really learns best this way – least of all a witness faced with the daunting task of answering questions posed by an opposing attorney whose sole mission is to make the witness and/or its employer look bad. And a witness who has not been prepared properly stands a far lower chance of helping the party to shape the case and position it for a favorable resolution – which is every litigant's ultimate goal.

The Realities of Modern Litigation

We've all heard the statistics about the low percentage of lawsuits that actually result in a trial. In Texas, the number of cases in the state's district courts that were resolved by juries fell by 20% in 2011 alone – even as the number of new lawsuits filed continued to climb. There

were 1,195 jury trials in 2011, just one-third as many as were conducted in 1996. During the same 15-year period, the number of lawsuits filed annually rose 25%. In 1996, one in every 48 lawsuits (roughly 2%) was decided by juries; in 2011, that figure was one in 183 (just over 0.05%).¹ A study presented at the Pound Civil Justice Institute's 2011 Forum for State Appellate Judges revealed similar declines. The study showed that the percentage of civil cases terminated during or after trial in the federal courts dropped from 12% (1 in 8 cases) in 1963 to approximately 1% (1 in 100 cases) in 2010.²

Many people familiar with the American courts system discuss these figures so casually that it appears we've become desensitized to the data, but the significant impact this shift has on litigation, case strategy and development, and claim resolution should not be overlooked. For starters, the senior and junior partners representing the majority of corporate litigants today – the attorneys most likely to be responsible for the management and trial of lawsuits – either practiced at a time when a significant portion of all lawsuits were actually tried to verdict, or were trained by those who did. The prevailing wisdom among a large number of litigation attorneys has been shaped by an outdated construct.

For well over two decades – perhaps double that time - the philosophy that has dominated litigation and deposition discovery is “defense, defense, defense.” In other words, attorneys believed and taught their witnesses that the goal of a deposition was to give the opposing attorney as little information as possible. It was considered heresy to suggest that a witness might reveal anything particularly powerful about a party's case, let alone deliberately offer an affirmative theory or narrative of the case, especially if there was a chance the opposing party

¹ Mark Curriden, Civil Jury Trials Plummet in Texas, Dallas Morning News (April 2, 2012) at <http://www.dallasnews.com/business/headlines/20120402-civil-jury-trials-plummet-in-texas.ece>

² Galanter, M. and Frozema, A. The Continuing Decline of Civil Trials in American Courts, Forum for State Appellate Judges (Pound Civil Justice Institute 2011).

might not know it already. That view made more sense at a time when an attorney could realistically expect to try 1 in every 8 cases to a jury, because counsel and the client didn't want to show all of their cards knowing that there was a good chance of a trial. The element of surprise could make a real difference in the outcome of the case.

In modern litigation, fewer than 1% of all lawsuits reach trial. That element of surprise no longer matters the way it once did. Witnesses typically testify only once during a case – in deposition. Attorneys no longer have to worry in most cases that by revealing important details during deposition testimony, their witnesses will give opposing counsel an opportunity to prepare a more powerful cross-examination for trial. This is a very different world. And it requires very different thinking.

Deposition Discovery As a Virtual Trial

Given the obvious shift away from trying lawsuits to juries, litigants now try cases “virtually” – primarily during deposition discovery. Jurors, once the ultimate arbiters of a case's merit and value, have been replaced in most cases by other individuals who wield the power to decide how a case will be resolved. Mediators, opposing counsel, risk managers, claim professionals, insurance executives, and individual litigants themselves now play a much more significant role in determining the outcome of a case. Of course, these people have always had the ability to affect the manner in which a case has been resolved, but now more than ever it is their evaluation of lawsuits that dictates the manner in which (and dollar value at which) cases are settled. Therefore, positioning a lawsuit during discovery for the most favorable resolution possible – shifting the opposition's best alternative to a negotiated agreement in a way that is favorable to one's own case - is vital.

Developing a case fully and powerfully during deposition discovery is far more important than ever before, because it is during depositions that attorneys evaluate the strength of witnesses, a party's ability to manage dangerous facts and issues, and the way in which the case would be tried if no settlement were reached. Framing the issues of a case, and developing themes and a dramatic arc through which to tell the story of the case, all require a litigant to have witnesses who can deliver that affirmative narrative. It is for this reason that proper preparation of the individuals who will testify during deposition discovery – who will tell the litigant's story – is central to positioning a case for favorable resolution.

Pitfalls of Traditional Testimony Preparation

Making testimony is no different than any other acquired skill. It requires some amount of practice. It's not sufficient simply to "know what you know" or to be generally familiar with the key documents in a case. In fact, if the witness hasn't thought about precisely how they will address the key events, communications, actions, documents, etc., it is more likely than not that they will have a very difficult time finding the right words when required to do so under oath. Witnesses often find themselves at a loss for the right words when the moment requires it. They misspeak, they agree to characterizations offered by opposing counsel because they come close to capturing the truth, they come across as less than in command of the facts in the case and their (or their employer's) fundamental position on the issues. Once that testimony is "in the can," there's much less that can be done to correct it. Important witnesses need and deserve more. Isn't the better approach, then, to give the witness as many tools with which to navigate the deposition as possible?

The Important Witness

This begs the question: “Who is an important witness?” For purposes of this paper, any witness who works for a corporate defendant is an important witness. It’s irrelevant whether they’re being designated as a Person Most Knowledgeable or a corporate representative pursuant to FED. R. CIV. P. 30(b)(6). If the individual is an *employee* of the company, then he or she is a *representative* of the company and many jurors will perceive that person to speak (in some way) *on behalf of* the company.

Proper preparation of these witnesses is vital, because powerful testimony – or even testimony that merely demonstrates for the adversary that the company’s witnesses will be well prepared and difficult to manipulate – can have a significant effect on the value of a case. For these witnesses, a genuine intent to tell truth simply is not enough. The attorney should prepare the witness to transcend the basic obligations imposed by virtue of taking an oath if the witness is to make the kind of testimony that can position a case for a more successful resolution in settlement or at trial.

Another Perspective On The Witness’ Oath

The tradition of requiring witnesses to swear an honesty oath is believed to trace back to Roman times. Latin scholars note that the root word “testis” (from which the word “testimony” is derived) probably comes from the Ancient Greek for “three” in light of a witness’ role as a third observer of events. The word “oath” is Anglo-Saxon in its origin. The Anglo-Saxons used oaths not only to swear fealty to feudal lords, but also to ensure honesty during legal proceedings and transactions. The phrase “the truth, the whole truth, and nothing but the truth” is believed to

have initially been coined in Old English, and to have become a fixture of English trials by the 13th century.³

I want to invite you to consider this oath we've all heard so many times from a different perspective. What does it mean for witnesses? What does it truly require that a witness do throughout their testimony? Successful preparation of important witnesses relies on three fundamental elements: (1) finding out what the witness knows, (2) helping them to think about how to testify to it clearly and accurately, and (3) preparing them for questioning by an adverse attorney. A review of the elements of the witness' oath and what each means for the witness as they think about their testimony might prove helpful in considering a new way of preparing them for their task.

The Truth, The Whole Truth, and Nothing But The Truth – Foundational Elements

There are three basic elements of testimony, captured by the very oath that each witness takes before they begin to give it:

- **The Truth:** These are the facts to which the witness can speak with personal knowledge;
- **The Whole Truth:** Additional information that gives the facts greater meaning; and
- **Nothing But The Truth:** Anything the witness knows is *not* true.

In order to satisfy their oath completely, the witness must do three things throughout their testimony:

- Report and describe the facts (i.e. tell the truth);

³ “Where Did We Get Our Oath? The origin of the truth, the whole truth, and nothing but the truth.”Slate.com, accessed January 21, 2012, http://www.slate.com/articles/news_and_politics/explainer/2004/04/where_did_we_get_our_oath.html

- Give those facts the necessary context and background in order to be understood fully and fairly (i.e. tell the whole truth); and
- Protect against inaccuracy and mischaracterization of the facts (i.e. tell nothing but the truth).

Giving some fuller meaning to the elements of the oath is just the beginning. It's the easy part. The next, and far more important, step is helping the witness to take their understanding of the oath and their task, and to transform it into a set of skills that will help them to be successful when the big moment arrives.

Relationships Matter

The success of any witness preparation, but particularly one utilizing the methods advocated herein, begins with the relationship between the witness and their attorney. Trust is essential. Most witnesses, and especially those whose conduct has become the subject of some scrutiny, are very anxious about having to answer questions about their actions and decisions. Even when told by their employer or (in the case of a third-party claim) insurer that the attorney is their advocate, they often suspect that the attorney is actually *their employer's* or *their insurer's* attorney. Developing a trusting relationship and a rapport with the witness will go a very long way toward helping the witness to relax about the preparation process and, in turn, the testimony itself.

In order to nurture this relationship, the attorney should take a few hours to get to know the witness – both personally and professionally. This can take place as an informal conversation over a meal, a structured interview, or a combination of the two. The point is for the attorney to learn as much as possible about the witness and, hopefully, to share some similar information about him or herself. In doing so, the attorney will not only develop a closer

relationship with, and a sense of trust in, their witness. Counsel will also gain important insight into the things that make the witness tick. As is discussed in a bit more detail below, that background and history may very well become an important part of helping the witness to tell their Whole Truth.

Similarly, the attorney should be sure to respect and address compassionately the concerns of each witness they prepares for testimony. It is important to support the witness by addressing any and all sources of worry, because failing to do so will only cause the witness to be distracted by their worry and hamper their ability to testify effectively.

The Preparation Process

One thing must be absolutely clear about this process from the outset: *it is absolutely not about spin.*

This process is intended to provide the witness with the tools they need in order to communicate their truth as clearly and accurately as possible. It should be borne out of each witness' genuine, personal sense of what is true, regardless of whether it is identical to the testimony of other witnesses in the case. (In fact, the witness will be far more successful if they are able to distinguish thoughtfully between their own perspective on the events giving rise to the dispute and that of other witnesses.) The goal of this approach is to maximize the witness' credibility with the jury by helping them to develop a clear and honest telling of their truth.

With that fundamental principle in mind, it is often helpful to think about teaching witnesses the skills necessary to make testimony successfully is similar to teaching a child to ride a bicycle for the first time. In most instances, witnesses will be participating in this activity for the first time when they give their deposition. Just as a parent wouldn't expect his or her child to ride a bike without crashing if the only instruction provided to the child came in the form of a

lecture about how to ride a bike, attorneys shouldn't expect a witness to navigate a deposition successfully if the only instruction provided to the witness is a "do this, don't do that" lecture. The new cyclist must be shown how to do it on their own, and they must be given an opportunity to practice while their teacher holds onto them and helps them to find their balance. Likewise, teaching a witness to testify about their truth involves teaching them, and then helping them to hone unique communication skills. They must know that their job is not simply to "tell it like it is," because doing so (the way most people do it without proper preparation) frequently results in ineffective testimony. Speaking with the care and control required of a witness in a legal proceeding demands tremendous discipline. It requires a methodical, almost systematic, analysis of questions, consideration of one's relevant experiences, and the selection of precise language to describe them. Without that great care, witnesses' often get confused, express themselves inartfully, and ultimately succumb to being manipulated by a better-prepared attorney in command of his or her case.

Communications experts and trial consultants alike teach us that repeated telling of a story creates increased efficiency. Over time and repeated telling, the speaker will find more appropriate words and phrases, as well as clearer and more concise explanations. Making testimony is no different. The preparation process should involve talking with the witness about the relevant facts in a careful and detailed fashion. The witness should be asked questions that dig beneath the surface of their initial retelling of the pertinent events, and they should be challenged to think about their experience from a number of different perspectives. Once the witness begins to find language that feels comfortable and captures their truth accurately, they should be asked to do it repeatedly in the form of mock question and answer sessions.

A Word About Timing: Plan Ahead

Because preparing for a deposition is by no means any less important than studying for a big exam, planning and preparation are vital to success. All too often, busy attorneys and busy (if not reluctant) witnesses leave preparation for a deposition until it is too late to prepare sufficiently. As is discussed further below, giving oneself adequate time with his or her witness is necessary for a number of reasons. It will allow the attorney time to develop a rapport with the witness, explore the witness' recollection and impressions of the key facts and documents they is likely to face questions about, and give the witness sufficient reps to feel confident as they head into their deposition.

Further, understanding that geographic and budget constraints may require otherwise, an attorney's preparation and meetings with the witness ideally would not occur on consecutive days. Meetings should take place on dates that are separated sufficiently so as to allow the witnesses can process the information and skills they have covered and learned. Equally important, allowing some time and space between sessions will help the witness to store their recollections and the language used to describe them in long-term memory, so they are not forgotten as quickly as they are identified. This is the witness' equivalent of an athlete's rest day during a series of training sessions. Conducting witness preparation in a combination of full or half-day sessions with at least one day between them will assist with this process.

And, although this preparation process may sometimes require some amount of last minute study, significant late-game learning (experienced by many of us during college in the form of cramming for exams) should be avoided. With the certain pressure of an impending deposition or trial upon them, witnesses rarely are capable of digesting and retaining new information such as key words or phrases, case themes, etc. on the eve of their testimony. For that reason, last minute preparation should be limited to reviewing the details of documents,

emails, and other materials that the witness has been over previously in much greater detail. This amounts to final touch-up. It should be nothing more.

Muscle Memory

The key to this process is repetition. The attorney should have multiple conversations with the witness about the facts and how to testify about them most clearly. And, there should be several opportunities for the witness to listen to and answer questions posed in an adverse manner. This repetition is central to successful testimony. This is true because the act of hearing questions, identifying problems with questions, and retrieving specific words and phrases to answer certain questions is a neurolinguistic skill. This listening and speaking with precision is muscle memory. It is no different than a golf swing or a swimming stroke or a free throw. Initially, it will feel clumsy to the witness, but once learned it can be refined and ultimately mastered.

You Play The Way You Practice

This maxim is widely attributed to college football coaching legend Glenn “Pop” Warner, and it is most frequently cited in discussions about sports. Nobody disputes that practice is the way to prepare for a tennis match – or even a piano recital. Complex and physically challenging activities that must be performed without a coach’s immediate feedback or direction, or the chance for a do-over, are clearly dependent upon practice if they are to be done at a high level. But we seldom think about practice as something that would benefit a witness – despite the fact that making testimony is physically and mentally challenging, must be done without immediate direction from counsel, and allows for no do-overs. It is incredibly important that witnesses be prepared not only for the subject matter of their deposition, but the tenor of the examination as well, and practice is the way to ensure that they are.

Understanding that practicing the process of listening to questions, retrieving clear and effective language for answering questions, and delivering answers concisely is a learned skill, the natural next question becomes, “How should counsel go about giving the witness practice Q&A?” The examination any witness faces in their preparation should be at least as difficult as the questions they will be forced to answer while making their testimony. The goal here is for the witness to leave the deposition feeling not as though they were prepared for each and every question they were asked throughout their deposition (although that would be fantastic!), but rather as though there was nothing more challenging than they were asked to contend with during their preparation.

Dress For Success

Finally, but by no means least importantly, the following maxims are absolutely supported by hard science (no matter how clichéd they may sound):

- A witness who is judged to be attractive (e.g. neatly and appropriately dressed, body erect, head up with a smile on their face) is also generally judged to be more credible;
- Similarly, when a person’s self-image is positive (and they believe they look good to others), they tend to feel happier and more confident.

Moreover, many depositions today are videotaped. It is a good idea to think of the witness as a guest on a television news or interview program. Preparing for the testimony based upon the assumption that it will be videotaped is always the better part of valor.

With these truths in mind, the attorney should help the witness make good decisions about how to dress for their testimony. A very thoughtful, and deliberate, conversation about what the witness will wear, including not only clothing but jewelry and their hair, will benefit the

witness. The general rule to be followed is that the witness should look their best. With some very limited exceptions, this means that the witness should not “dress down” in order to wear whatever their work uniform might be. In other words, a construction worker should not appear at his deposition dressed in jeans, a worn out flannel shirt and work boots. On the other hand, it may be appropriate (depending upon the nature of the witness’ anticipated testimony) for a law enforcement officer to wear their uniform when appearing to give testimony.

Telling The Truth

With these practical and logistical considerations for the witness preparation in mind, it is now time to focus on how to teach witnesses to fulfill their oath more powerfully. Not surprisingly, this begins with helping them to explore how to tell their Truth in a more clear and concise manner.

Finding the Right Language

Speaking the Truth in the context of legal testimony requires using very careful and accurate language. It may well be necessary for counsel to search long and hard with the witness to find the word or phrase that best captures the essence of the witness’s truth. This is important, because it is much easier to think and communicate about a thing (an event, a transaction, a document) when one has a word for it. This is particularly true in lawsuits, where giving something a name can be very helpful to jurors and other decision makers as they try to understand it.

Jurors, like any other listeners, use names and titles of important case elements like they use headings in a newspaper article. The names become tools for organizing the case story in their minds. For this reason, these names are most powerful when they are easy to remember, capture rich imagery, and help the jurors remember the key related facts and arguments.

In preparation for their testimony, counsel should work with the witness to identify useful names to describe important elements of the case. Doing so will not only help the attorney and the witness to find the right language to describe their experience. It will help them to brainstorm the key moments in the story of the case, identify key situations, and prepare the witness to talk about the essential areas of disagreement between the parties more knowledgeably.

Keeping Answers Succinct

Equally important for any witness is the ability to tell their story in a concise, controlled manner. We've all suffered through at least one deposition where a witness offered rambling, confusing answers to even the most simple and straightforward questions. Longwinded answers often provide opposing counsel with fertile, new ground to plow. That is the obvious problem. However, even where a long answer is purely responsive to the question and volunteers no supplemental information, it still creates problems for the witness and the case.

For starters, long answers are much more difficult for the listener to process, understand and remember. Communication studies have revealed that some listeners feel a great deal of pressure when asked – implicitly – to remember large quantities of information given in the form of an answer to a question. Some will remember the very earliest portion of the answer, but fail to capture the middle and end of the answer because they focused too hard on remembering what they heard first. Others will remember only the end because they tried so hard to pay attention to what the witness was saying as it was coming out of the witness' mouth. In either case, the listener is unable to remember everything – even where the subject matter of the answer is somewhat familiar to the listener. Now consider that the listener is hearing information on a subject about which they know very little or nothing at all. It creates a tremendous burden.

To understand the challenge to the juror, imagine this scenario: You have been given a grocery list to shop for, but the list is not in writing. The speaker is making an exotic dinner you've never eaten before, and it contains many unique ingredients that are completely foreign to you. Next challenge: the speaker has given you the list just one time and expects you to remember everything on it. Oh, and the list is not in writing ... and you can't make notes! You've got to listen to it and remember everything. Daunting? This is precisely the job jurors are faced with, on a much larger scale. Each answer given by a witness (or, perhaps, sequence of answers on a particular topic) is a grocery list. The jurors are shopping for the case's storyline, so it's vital that counsel and the witness make the ingredients of that story easy for them to understand, process and remember.

Another problem is that long answers, particularly when offered to explain actions or decisions, very often appear to be self-serving. Whether it is actually the case or not, jurors often perceive a witness to be falling all over himself to excuse his behavior when his answers are long and become non-responsive. It goes without saying that we want to avoid that perception wherever possible.

The takeaway lesson here is as follows: The best answers are short ones. The attorney should be sure to spend a good portion of the preparation time giving the witness a chance to practice answering questions asked by a hostile attorney in a short and direct manner. Think about basic sentence structure. Subject. Verb. Direct object. One or two descriptors might be acceptable, but otherwise the answers should be this short. As counsel does so, they should be sure to listen to the witness's answers as a juror would. And they should challenge the witness to refine their answers – not in order to tell the witness what their answer should be. Rather, the

goal is to encourage the witness to find the most accurate, descriptive and succinct language to tell their truth.

Telling The Whole Truth

The key to this portion of the witness's oath is, once again, to bear in mind the witness's audience. Whether it is opposing counsel, a mediator, a round table of adjusters or risk managers, or a panel of jurors, the amount of information the audience has about the background and context for the witness' experience will play a significant role in how well they understand and identify with the testimony.

Background refers to two things: (1) the history of the event or transaction at issue in the case; and (2) the witness' personal background. Each is important to the attorney in preparation of the witness for testimony, and it may be equally important for the audience. With respect to the history of the events or transactions at the heart of the case, it is often important for the witness to provide the factual backdrop of the policy, claim, relationship, or other key elements in order for the witness's actions to make the most sense. Similarly, having a better understanding of a witness's personal history can make identifying with their attitudes and behaviors much easier for jurors and other decision makers.

Context refers to the other information – people, events, pressures, deadlines, conflicts, etc. – that provide the *explanation* for the thing that is central to the witness' testimony. Being able to provide this color will enable a witness to ensure that an opposing attorney's narrow examination does not leave important detail on the cutting room floor. In fact, sometimes the context itself is the story counsel and the witness will want the jury to remember – not the singular act the opposing counsel wants to focus on.

In order to be prepared to provide the background and context necessary to a recitation of the Whole Truth, a witness must have thought widely and bravely about their experience. Moreover, the ability to introduce that background and context without volunteering a great deal of information gratuitously is a skill that must be developed. As was discussed briefly earlier, a lengthy and candid discussion with the witness about their personal background and their experiences at issue in the case is a vital tool in helping counsel to (a) get to know the witness better and (b) help the witness prepare to fill in the blanks that are so essential to the audience's understanding of the witness's experience. Once the attorney and witness have a full understanding of the setting in which the witness acted (whether the action was the sending of a single email or the overall management of a claim), counsel and the witness can begin to work on finding ways for the witness to introduce the additional details in a manner that exhibits a command of the subject matter and the examination.

While not easy in practice, the manner in which a witness can introduce background and context in their testimony is relatively simple and straightforward conceptually. When a witness believes that additional detail is necessary in order for their testimony to capture the Whole Truth, the witness should literally introduce the fact that there is additional important information. In essence, the answer should include a response that says "and there is an important reason why." In making that statement, the witness does two important things: (1) they ensure that the audience hears that there is additional information necessary to a full understanding of the answer, and (b) they force opposing counsel to decide whether to acquiesce and elicit the additional information. This is not a basic skill. It must be practiced. However, with repetition, most witnesses will find that they develop an ability to hear questions that

require greater information than is sought and to introduce it without coming across as overly self-serving.

Nothing But The Truth – Playing Defense

A witness under examination by the opposing party's attorney may very well spend more time playing defense (that is, defending against mischaracterizations and inaccuracy in the questions) than they do telling their story affirmatively. In order to do so effectively, the witness must not simply be prepared to disagree with such statements. The witness should be able to speak with the same amount of precision, the same thoughtful language, and the same background and context as are necessary to tell the Truth and the Whole Truth. In other words, the same preparation that goes into offering direct testimony about one's experience should be applied to readying a witness to manage a hostile examination.

The first step in dealing with difficult questions is to listen. In casual conversation, people very often do not listen to an entire question. Already in possession of the important context and background, people frequently listen for the gist of a question, but do not *audit* a question the way a witness must. This will not do in cross-examination. Successful management of cross-examination on the witness's part requires a near dissection of each question in order to ensure that the witness (1) can hold all of its parts in their mind, (2) can understand it, and (3) agrees with it. If the witness cannot do all of these things, the witness cannot ensure that they will be able to answer the question truthfully. In that case, it is the witness' obligation to demand a question that they can answer in such a manner.

There are three elements of any examination the attorney can teach a witness to control: (1) pace, (2) scale, and (3) language. Specifically, a witness must insist that the examining attorney not conduct the deposition at a pace that makes it difficult or impossible for the witness

to hear and understand each question, as well as have time to think clearly about the truthful and accurate response to the question. Similarly, if a question is so large (in other words, long) that the witness cannot hold all of its parts in their head, then the witness must insist that the attorney ask a more succinct question. (For example, a question with multiple components should be broken into individual parts and answered separately.) And, if the question utilizes language that is inaccurate or mischaracterizes the truth as the witness understands it, then the witness must correct such inaccuracy or mischaracterization so as not to be seen as having adopted it tacitly.

There are a number of different exercises the attorney can utilize with the witness in order to prepare them for cross-examination. For example, the attorney can ask lengthy questions that contain subtle inaccuracies or mischaracterizations. The witness should be given an opportunity to identify any problems with the question and “push back” in order to demand that the question be asked more properly. Similarly, the attorney can ask questions that omit important details from the question that are necessary to avoid mischaracterization of the evidence. In doing so, the witness should practice identifying the lack of an important detail and requesting that the attorney restate the question so as to ensure a fair characterization of the evidence. Or, the attorney can ask questions that require a simple yes or no answer, and invite the witness to practice different ways to disagree with the inherent proposition in the question. In each of these exercises, and in the witness’ actual testimony, it is essential that the witness be the most polite person in the room. No matter how contentious the examining attorney might be, and no matter how frustrated that attorney might become in response to the witness’ vigilance, the witness must remain at all times poised and courteous.

Ultimately, the key is to simulate cross-examination as realistically as possible, given what counsel knows about opposing counsel and their style. Because listening this carefully and

requiring that the attorney pose answerable questions can be draining mentally, repetition will prove most helpful to the witness. Remember, “You play like you practice.”

Conclusion

The development of teaching skills on the part of the attorney is no doubt just as challenging a task as the preparation for testimony on the part of the witness. However, it is a challenge well worth undertaking. As the attorney becomes more adept at working with their witnesses to refine testimony and to manage opposing counsel’s examination, they will come to find that they have gained a much more complete understanding of their case and how to present it to any and all decision makers. Moreover, the witness will approach their job as truth-teller in a far more comfortable and confident frame of mind. Each of these, both individually and in concert with one another, is a significant part of positioning a case for favorable resolution.