

Powerful witness preparation

BY DAN SMALL

Not so long ago, persuading lay people that they needed extensive preparation before testifying in a legal proceeding was a battle. Many confident, articulate executives were convinced they could just “go in and tell my story,” and they were insulted by the notion that they needed some lawyer to prepare them. Too many experienced lawyers didn’t push back.

Then came an explosion of high-profile lawsuits and investigations, and with them a parade of highly successful executives who proved to be very bad witnesses. Bill Gates, Martha Stewart, Scooter Libby, Dennis Kozlowski, Kenneth Lay — the list goes on. Now, people faced with the prospect of being a witness may wonder if there is some reason this happened, and if it could happen to them. The answers are “Yes” and “Yes.”

It happened because clients failed to understand that they were entering a different and dangerous world. In this world, it’s not just about experience and intelligence. It’s about preparation, and understanding the audience, the rules and the “core themes” of the case. Even executives who have spent years mastering the corporate world must nonetheless understand it takes commitment, time and effort. This article offers tips to help you better prepare your clients.

Several years ago, the TV series *The West Wing* had a series of episodes about a scandal in the White House. The president had multiple sclerosis and he and his advisers did not disclose it. The news has

now broken, and an investigation has been launched into whether top aides broke the law in covering this up. The president’s press secretary, C.J., has been subpoenaed to testify and has been called to meet with the White House counsel to prepare.

C.J. is intelligent and talkative. She is clearly nervous and angry about the situation — and takes it out on counsel by being sarcastic, uncooperative and not eager to take advice. Counsel is trying to make her understand the need to prepare. Then, in mid-conversation, he stops, and there is roughly the following exchange:



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COUNSEL: Do you know what time it is?

C.J.: Sure, it’s 4:30.

COUNSEL: You’ve got to get out of the habit of doing that!

C.J.: Doing what?

COUNSEL: Answering more than was asked!

(*Pause*)

Do you know what time it is?

(*Long pause*)

C.J.: Yes.

COUNSEL: Now we’re making progress. We’ll take a break and meet again later today.

If you teach your witness nothing else, teach him or her the answer to the question, “Do you know what time it is?”

because the right answer is the difference between a conversation and testimony. In a conversation, the answer “yes,” the accurate answer, the precise answer, is a bad one. That’s not what the questioner meant. That’s not where the conversation is flowing. In the unnatural and precise testimony environment, it’s the right answer. That is a core difference between a normal conversation and testimony.

Testimony is not a conversation. It has its own language and its own rhythm. Question, pause, answer, stop. Guessing, interrupting and volunteering are inappropriate and dangerous in this narrow and artificial world, where every word is taken down under oath and may be picked apart.

In this world, the questioner appears to be in control. It’s an illusion, but even the most accomplished witness can fall victim to it. The witness has the right and the responsibility to take control. In meetings or other interactions, most people know the way to take control is not by shouting the loudest, but by utilizing some clearly established techniques or rules. So it is with testimony. Here are 10 rules.

1. TAKE YOUR TIME

This is, amazingly, the most important rule, and the one from which everything else follows. Slow it down, think it through and control the pace. Lawyers want rapid-fire Q&A, but if the lawyer makes a mistake, no one cares. If the witness makes a mistake, it is, “The Gift That Keeps On Giving.” From the very first question, slow it down.

2. REMEMBER YOU ARE MAKING A RECORD

You are dictating the first and final draft of a very important document, with no rewind button and no second draft, so think about your language. Certain words can take on special meanings. Learn what they are in your case, remembering words can have different meanings to different people. There will be only one transcript.

3. TELL THE TRUTH

This seems obvious, but truth in a witness environment is a very narrow concept. It's what you saw, heard or did. Everything else is a guess.

4. BE RELENTLESSLY POLITE

This will feel personal. They're attacking you. But remember that a witness who is angry or defensive isn't thinking clearly and isn't controlling the language or the pace. Lawyers know that. A few garbage questions, and off we go! It's a scam. Don't fall for it. Kill them with kindness. Be relentlessly polite, positive and focused.

5. DON'T ANSWER A QUESTION YOU DON'T UNDERSTAND

Is it vague language, strange phrasing or distorted assumptions? Is it just too long to be clear? It doesn't matter *why* the witness doesn't understand a question. Don't answer it. Just say, "Please rephrase the question." ►22

6. IF YOU DON'T REMEMBER, SAY SO

Answer clearly. Just say, "I don't recall," and stop. Don't try too hard, and don't change your answer just because the question is asked over and over.

7. DO NOT GUESS

Much of what makes a good conversationalist and an intelligent, intuitive person involves guessing. But guessing is inappropriate and dangerous for a witness. That includes hypothetical questions.

8. DO NOT VOLUNTEER

"Question, pause, answer, stop." A witness must become comfortable with the silence of waiting for the next question.

9. BE CAREFUL WITH DOCUMENTS

Documents are just written versions of what someone believed. Treat them mechanically. There is a simple, unvarying three-step protocol witnesses should follow: If you are asked a question that relates in any way to a document: (1) Ask to see the document. Don't allow anyone to draw you into a debate with a document that is not in front of you. You can't win. (2) Read it. There are three issues with any document: credibility, language and context. You cannot carefully consider each of them unless you read it. Read all of it, slowly and carefully. (3) Ask for the question again. It's basic fairness. They've read the documents and picked out one little piece to ask about. Now that you've read it, the question will be clearer (and you may get a better question).

10. USE YOUR COUNSEL

Listen to everything that is said, understand what objections mean for you, ask questions when you can and take breaks before you need them.

Most of these rules are difficult to master. They are contrary to what we're used to, and often counterintuitive. But if they are practiced, they can impose a degree of discipline and control on the process that makes it significantly more fair and productive.

Witness preparation is an important part of the litigation process. It involves a careful review of the audience, the rules and the core themes. It should also include extensive and realistic practice testimony. Learning how to testify is like learning to ride a bicycle: You can't do it just by talking about it. It might require some trauma and a few bruises. To master this strange world, you need to enter into it, and then review what you've done.

The legal profession too often has failed clients by not preparing them for the challenges of being a witness, sometimes with disastrous consequences. The damage can go beyond one case and reverberate for years to come.

Anyone in any business in America today is either in the litigation business too, or eventually will be. You and your clients need to accept that and understand the process in order to manage it. An investment in witness preparation can be an extraordinarily productive one financially and, as one executive I've prepared has commented, it also will help you — and your clients — sleep better at night. ■

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