EMPOWERING WITNESSES

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This article draws on Israel's book Taking and Defending Depositions. Author and law professor Peter T. Hoffman (Israel's law school roommate) introduced Israel to a variation of the six-answer principle.

> *"I knew [he] was going to be a bad witness by the enormously confident way that he marched into the box, held the Bible up aloft and promised to tell the truth, the whole truth and nothing but the truth. He was that dreadful sort of witness, the one who can't wait to give evidence, and who has been longing, with unconcealed impatience, for his day in Court. He leant up against the top of the box and surveyed us all with an expression of tolerant disdain, as though we had made a bit of a pig's breakfast of his case up to that moment, and it was now up to him to put it right."*
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> —Horace Rumpole, on his overconfident client[1]

As litigators know, witnesses are not all the same. Every witness has weaknesses and strengths. Witnesses have myriad idiosyncrasies and a variety of anxieties about testifying. They often have mistaken assumptions about what it means to be an effective witness.

Here's one example from the TV show Taxi. Dispatcher Louie DePalma, played by Danny DeVito, gets a subpoena to testify. One of the drivers says: "Louie, you're gonna be under oath, you know what that means!" Louie smirks and responds: "Yeah. It means they *got* to believe me."[2]

Some witnesses, like Louie, are overconfident. Others lack confidence. Some, for various psychological reasons, suffer from the Stockholm Syndrome and identify with the other side. Some are too agreeable. Some are too disagreeable. Some are too taciturn. Others are too loquacious. Some use pretentious words—like *taciturn* and *loquacious*.

Every witness is different in some ways from the last witness and from the next witness. But all witnesses have one thing in common: they need help from their side's lawyer. From you.

Ahead, I suggest eight topics to start witness-preparation before you get into the case-specific details of the direct examination and the anticipated cross-examination. Then I discuss rules for witnesses and the only six answers that a prepared witness needs.

These topics are aimed at empowering witnesses, at clearing the witness's path—and yours—to presenting effective testimony. You, of course, will tailor your treatment of these topics and your preparation efforts to each witness, to the pertinent circumstances, to your resources, and to your personality.

EIGHT PRELIMINARY TOPICS

Confidentiality

You will assure the witness that the sensitive content of your discussion won't later appear on the front page of the New York Times. For clients, you will explain the attorney-client privilege. For non-clients, you will communicate your discretion.

The predecessor to the Model Rules of Professional Conduct distinguished between confidences and secrets. Confidences are privileged. Secrets are subject to the lawyer's discretion and respect for

witness privacy. Explaining these things will help build trust and alleviate witness-anxiety.

Of course, only make privacy commitments you will be able to keep. Sometimes you will have to open the curtain and act on information you get from prospective witnesses.

Sometimes, for example, union lawyers must navigate the different—if not conflicting—obligations owed to the international, the local, unit members, other parties, the court, and others. It is the same for most lawyers who represent institutions or multiple parties. Management lawyers may have to navigate the different—if not conflicting—interests between the CEO, the COO, in-house counsel, the HR director, managers, shareholders, and others.

Truth

You will explain that the witness's job is easy: *tell the truth*. Mark Twain wrote: "When in doubt, tell the truth."[3] Of course, as Oscar Wilde noted: "The truth is rarely pure and never simple."[4]

There is the joke about asking how much two and two are. The accountant answers: "Four." The mathematician answers: "Four." The lawyer answers: "How much do you want it to be?"

Your assurance that you are looking for the truth will free the witness from wondering whether you expect him or her to—shall we say—*stretch* the truth. Or worse.

That brings us to the next topic—coaching witnesses.

It's okay to prepare testimony

You will assure the witness that not only is it okay to be having this preparation-conversation—it is *good, ethical*, and *necessary*. I repeat for emphasis: Coaching is good. Coaching is ethical. Coaching is necessary.

Coaching—done well, ethically, and properly—is preparation led by an accomplished lawyer aimed at getting the witness ready to *effectively* present the truth.

Effective testimony requires collaboration. The lawyer and the witness will make judgments about testimonial-things like: (i) what facts to include as necessary and what facts to exclude as superfluous; (ii) the order of presentation—by topic, by chronology, or by some other organizing principle; (iii) wording, clarity, and emotional tone; (iv) putting the em*phas*is on the right syl*la*ble; (v) the use of aids, like photos, charts, documents, etc.

Every witness needs a good coach. Most need practice answering direct and cross-examination questions. You will explain that you and the witness need to prepare and practice to present the evidence in the best light to—as the song says—*accentuate* the positive.

The truth is too important to leave to improvisation.

What the case is about

You will tell the witness something like: Our side is saying ABC. To prove our case, we need to provide evidence—witness testimony and documents and other exhibits—to show A, B, and C. The other side says we can't prove A or C. Their defense is XYZ. We will show they are overlooking 1, 2, and 3. Here is how *your* important testimony fits in to the big picture…

The depth and detail of your case overview will vary depending on the witness's role in the big picture. But some level of education about the case is appropriate and almost always necessary.

In addition, educated witnesses may end up educating you—by providing information, ideas, perspectives, and insights that may otherwise escape your attention.

How the litigation process works

You will tell the witness: There will be a judge and a jury (or an ALJ, an arbitrator, or lawyers at a deposition). There will be the other side—lawyers call

them parties—and maybe others, like court watchers and the media.

There will be a court reporter typing hieroglyphics or using some other method to preserve every word for posterity—and for the appeals court or a summary judgment proceeding.

You will explain that the court reporter may make requests like: "Speak up, please." The judge, ALJ, or arbitrator also might offer his or her two cents on something. You will advise the witness: pay attention.

You will explain that the witness will testify and answer your questions on direct and then will answer the other side's questions on cross-examination. You will explain that the witness may get questions from the judge, the ALJ, or the arbitrator. If so—you will tell the witness—don't worry about whether the questions are insightful, or inane, or stupid. Just answer with the truth.

You might explain the technical differences in question formats. For example, on direct you generally will ask open questions. In contrast, the cross-examiner will often ask leading questions. You might ask: "What color was the car?" The witness would answer: "Blue." The cross-examiner might ask: "Isn't it true that the car was blue?" The witness would answer: "Yes."

The difference is whether the evidence is in the witness's answer or in the witness's confirmation of the content of the leading question. You will advise the witness to pay attention to the questions.

You will tell the witness that you will discuss anticipated questions and answers in detail when you prepare on the substance of the witness's direct testimony and on the substance of the expected cross-examination. The good news for now—you will tell the witness—is that witnesses don't have to master technicalities. All witnesses have to do is listen carefully and answer truthfully. You will explain in particular that the witness doesn't have to master objection technicalities. When the witness is on the stand and a lawyer objects, here is all the witness has to do:

- Be quiet (i.e., shut up);
- Listen to the objection and discussion—and maybe learn something useful;
- Wait for an instruction from the judge, or you, about whether to answer; and
- Follow that instruction.

As everyone seems deeply interested in the concept of hearsay, you might tell the witness not to be concerned about hearsay. Hearsay is complicated. You can reveal that generations of law students have failed to master hearsay and its exceptions. All the witness needs to do is tell the truth.

Exhibits

You will explain that the witness may be asked about exhibits—documents, a photograph, a chart, a 9mm Glock, etc. You will tell the witness to review each exhibit carefully, even if the witness is familiar with it. Even if the witness prepared the document, say, the witness should make sure it is *unaltered*, and has all its pages. Tell the witness: Take your time to review exhibits—as much time as you need. Everyone will wait.

Witness power

You will reveal that witnesses are powerful. You will explain that a witness need not answer if there is a problem with the question. It is perfectly proper for a witness to respond not by answering, but—as appropriate—with something like:

- "Please repeat the question."
- "I don't understand the question."
- "Please rephrase the question."
- "I didn't hear the question."
- "The question has several parts. Would you ask one part at a time."
- "The question assumes something that is not true."

Or—as appropriate—the witness can fix a defective question:

Q. "Isn't it true that the car was blue?"

A. "I would call it aquamarine."

The Mundane

You will provide any logistical information that will make it easy on the witness: where to go, how to get there, when to arrive, where to park, where to meet you, what to wear, what to bring, and what *not* to bring.

Tell the witness who else will be in the hearing room or at the deposition. As necessary, instruct: "Witness, you must stoically tolerate being in the presence of thine enemies."

You might describe the hearing room or the deposition room and estimate the timetable for the event—like the seven-hour deposition limit. As makes sense, you might describe the likely arrangements for water, coffee, and breaks for the bathroom, meals, smoking, and to call the babysitter.

Last, ask about the witness's concerns—about medical or physical needs, say—and whether there is anything else on the witness's mind.

These are my eight fundamental preliminary topics: confidentiality, truth, coaching, the case overview, the litigation process, exhibits, witness power, and the mundane. You may synthesize them into three or four topics or expand them into 27 topics—and tailor them to your case and your—and your witness's–needs.

Next, rules for witnesses and then the only six answers a witness needs.

RULES FOR WITNESSES

When I wrote the first edition of my deposition practice book—creatively titled Taking and Defending Depositions—I read lots of stuff.

I read bar journal and law review articles, CLE materials, and books. I read lawyers' and professors' advice on deposition and trial practice, on direct and cross examination preparation and techniques, and about what good lawyers are supposed to do—and avoid doing—to prepare witnesses and for effective advocacy.

I read a mountain of rules. I read some good stuff. But I also read lots of useless stuff, full of what Mark Twain called "fluff and flowers and verbosity."[5]

One ubiquitous admonition in the so-called professional literature is this: *Prepare*. This is good advice, as far as it goes. But too often it comes with no useful information on *how* to prepare.

An example. Two ranking lawyers from a BigLaw firm advised preparing your witnesses early. But not too early.

Advice to prepare early, but not too early—though meant well—has the practical utility of a pre-trial admonition not to put your pants on backwards.

Another example. Many professional articles tell lawyers to instruct witnesses: "never volunteer" information during cross-examination. I learned the "never volunteer" principle in basic training at Fort Knox back in the mists of time. I do *not* advise witnesses to follow it as a black-letter imperative. Witnesses *should* volunteer—if, as, and when volunteering makes sense.

Indeed, there is a recent ABA-published book which offers—as a modern epiphany—that it is *not* good to save important stuff for re-direct examination or for a post-deposition declaration.[6] Timely volunteering the witness's good stuff during cross-examination, the book advises, may be the most effective way to sink the cross-examiner's ship.

Advice that a witness should "never volunteer" during cross-examination—a staple of witness-preparation advice since before the American Revolution— "is not only wrong but can be dangerous."[7]

Got that, advocates? Some masters of the art of advocacy advise that witnesses during cross-examination should *never* volunteer information. Others say that advice is wrong and dangerous. How is a conscientious lawyer to tell good advice on witness-preparation from bad advice on witness-preparation? Do not worry—I have done this for you.

I synthesized all the good advice into my copyrighted list of *the* 162 *essential* rules for witnesses.[8] Point of information: My list is not really for witnesses. It is for lawyers. My list collects topics for *lawyers* to *think about* discussing with witnesses.

My list satirizes the so-called professional literature, which is full of solemn rules, some good, some useless, some foolish, and almost none without exceptions. It is intended to provide a checklist of practical advice for the perplexed. My list teaches that witnesses must *always* follow the 162 essential rules—*except* when it makes sense not to.

My list begins with "tell the truth" (rule 1) followed by "be prepared to answer who, what, where, when, why, why not, how, how much, what else, and is that everything" (rule 2). It moves on to "don't volunteer" (rule 33) and "volunteer when appropriate" (rule 34). It continues to advise that a witness is not obligated to provide all the details and relevant information if not asked to (rule 47) but *must not* omit the important details and relevant information and *must* give complete answers (rules 48 and 49). And so on. It ends with "don't screw up" (rule 162).

But you don't have to read my 162 rules to empower your witnesses. You can pass the following revelation on to your witnesses to simplify their burdens and alleviate their anxieties. It will streamline the preparation process and foster presentation of the truth. It is this: there are only six answers a witness needs.

That's right—*only* six answers. Like Archimedes said, *Eureka*!

THE ONLY SIX ANSWERS A WITNESS NEEDS

1. Blue. Ten o'clock in the morning. In the basement.
2. Yes.
3. No.
4. I don't remember.
5. I don't know.
6. I don't understand the question.

Here is why these are the only six answers a witness needs.

Number one answers provide facts:

- Blue, the color of the car.
- Ten in the morning, the time of the collision.
- The basement, where the body is buried.

The point for the witness: when asked for facts, provide facts. There is no need for the witness to divine the questioner's purpose behind the question. The pure and simple truth will do.

Number two and three answers also provide facts, but with reference to the questions asked.

- Yes, the content and premise of the question are correct.
- No, the content or the premise is incorrect.

The follow-up to a "no" answer likely will be a question calling for more facts, and some witness-volunteering, like:

Q. "Isn't true that the car was blue?"

A. "No."

Q. "What color was it?"

A. "It was aquamarine. And it had a white racing stripe."

The last three answers explain why the witness is not providing substantive facts (e.g., because the witness doesn't know the answer, doesn't remember

the answer—at least today, or doesn't understand the question).

For purists, I acknowledge that in some circumstances—in depositions, for example—there may be a seventh situation-specific answer to add to the list, something like: "Can we take a break?" or "I believe the fire alarm is going off!" But for preparation purposes, there are only the six answers.

Your newly enlightened witness will think, if not say: "There are only six answers! Being a witness is going to be easy! Why was I worried!? Swear me in!"

CASE-SPECIFIC PREPARATION AND PRACTICE

Having discussed with the witness the preliminaries, the 162 essential rules, and the six (or maybe seven) answers, you will then move on to prepare the case-specific substance of the direct-examination and for the anticipated cross-examination. In most instances, you and your witnesses will practice direct and cross. Like the joke about how you get to Carnagie Hall: "practice, dude, practice."

You will prepare and practice in collaboration with your now-confident and relaxed witness. Preparation and practice will empower the witness to give effective testimony.

You will prepare and practice on the case-specifics—the who, what, where, when, why, why not, how, how much, what else, and is that everything.

Of course—sophisticated litigator—you will be ready for every eventuality while your witness is on the stand. You will be flexible. You are well-aware, as Robert Burns wrote in 1785: "The best-laid schemes o' mice an' men/gang aft a-gley."[9] Or, as Mike Tyson is credited with saying: "Everybody has a plan until they get punched in the face."

You will remember, too, that "the truth is rarely pure and never simple," and the devil is in the details. Good luck. Ambrose Bierce defined litigation as: "A machine which you go into as a pig and come out of as a sausage."[10]

Notes

1 John Mortimer, Rumpole and the Genuine Article, in Rumpole and The Golden Thread (Penguin Books 1983).

2 Taxi: Louie Bumps into an Old Lady (ABC television broadcast Apr. 16, 1981).

3 Mark Twain, Following the Equator, Chapter 2 (1897).

4 Oscar Wilde, The Importance of Being Earnest, Act I (1895).

5 Letter from Mark Twain to David Watt Bowser (March 20, 1880), available at https://www.marktwainproject.org/xtf/view?docId=letters/UCCL01772.xml;style=letter;brand=mtp.

6 Kenneth R Berman, Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success (ABA Publishing 2018).

7 Id. at 2.

8 The list is in chapter 10 of my deposition book and has been reprinted elsewhere, including in Vol. 65, No. 5 The Practical Litigator (Oct. 2019).

9 Robert Burns, To a Mouse in Poems, Chiefly in the Scottish Dialect (Kilmarnock ed. 2015).

10 The Devil's Dictionary (Sirius 2023).