Preparing the lay witness

Guiding the lay witness through the intimidating process of oral examination can result in a sharper and more compelling case narrative.

Lois Heaney and Karen Jo Koonan

For most inexperienced witnesses, the prospect of testifying in a deposition or courtroom fills them with dread. Public speaking rates as most people's greatest fear, even ahead of death. The rigor of cross-examination, typically the focus of a deposition, produces even greater anxiety.

Many a well-intentioned attorney has done more to scare and unsettle a witness during preparation than to help. Typically an attorney's effort at witness preparation amounts to a lecture in *"don't-do-this," "don't-do-that,"* and *"by-the-way-you-shouldn't-do-this-either."* Actors refer to this as the impossible task of "trying to play a negative objective." Focusing only on the negative can leave witnesses overly self-conscious, trying their best to avoid potholes but having little idea what they *should* do.

In preparing lay witnesses to testify, attorneys should consider not only the content of the testimony but the communication skills of the witness and the emotional issues, particularly anxiety, that can interfere with effective communication. Investing your time and attention into guiding the lay witness through the intimidating process of oral examination will make your case narrative sharper and more compelling.

Getting the story

Witness preparation is not just about training witnesses; the first step is often an opportunity for the *attorney* to gain training in something most basic: listening. Attorneys are usually comfortable talking; many witnesses are not. Attorneys are prone to interrupting witnesses and perhaps overly anxious to "get to the point." They often focus narrowly on the legal issues or on a particular definition of relevancy. This approach can leave a witness tongue-tied and cause him to limit the information he imparts. A more open-ended approach will allow a witness to feel heard and able to speak more freely. When the focus is on developing and learning how to express the story, the witness should do more talking than the attorney.

Witness preparation begins with interviewing the witness, mindful that the scope of the interview may be quite different from that of the final testimony. An open-ended interview explores what occurred and under what circumstances, and how the lay witness knows what he knows about the events. The interview should explore the relationships between key people, their history together, their conflicts, motives and feelings, how the witness has dealt with these feelings, who he has talked to about it, and so on.

Frequently, witnesses have not had an opportunity to put the events in any context. Contextualizing tends to improve a witness's ability to remember and discuss the issues and events. The process requires the interviewing attorney to engage in reflective listening, summarize what the witness says, and probe for clarity and detail. The more information you glean from the interview, the more substance to pick and choose from for testimony, and the better you will understand your witness.

The atmosphere in the preparation session is important. Create a less formal air by posing questions that allow the witness to find her own words (e.g., *Tell me about,…*or, *If you were to explain this to your best friend, what would you say?*) This process helps the witness open up and may facilitate the revelation of important elements of the story.

Carrying part of the story

Your witness will need a clear sense of how his testimony fits into the overall case. What is the objective of his testimony? What important points must he get across? What special perspective or piece of the story does this witness carry, and what does he alone bring to trial? Identifying these points helps a witness stay on focus and ensures his testimony is not merely duplicative of other witnesses. On the other hand, parties often feel that they carry the entire weight of the trial in their testimony. Explaining how their testimony is only one part of winning the trial can help relieve a sense of unbearable burden.

Five sentences

Once the attorney has fully explored the witness's story, ask the witness to tell the story in five sentences. This interactive exercise helps both witness and attorney understand the heart of the story. Once that is articulated, the witness (and the attorney) have a guide to judge what

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is relevant and what is not. If a piece of information helps to explain one of the five sentences, it is important; if it does not, the jury need not hear it.

Telling the story in five points should include the universal elements of every story:

- Good guys and bad guys;
- A beginning, middle and end;
- Motives;
- Turning points; and
- A crisis. (The crisis resolution is often the jury's verdict, thus pulling the jurors into the story).

Hidden fears: Anticipating testimony

Most lay witnesses and clients worry over some element of their testimony. Some will be upfront with their fears: *"Can they ask me about ..."* or *"they can't ask me that, can they?"*

Ask the witness to list the things that worry her and then press for more; try to get down to the real source of concern. It may help to have the witness play the role of opposing counsel, cross-examining on these points. This exercise often reveals hidden anxieties and issues needing clarification. Role-playing allows the witness to watch someone model an effective way to handle thorny problems. Not infrequently, some of what a witness is worried about is beyond the scope of direct or cross-examination; learning that fact alone often has a calming effect.

Working too hard

Anxiety about testimony leads some witnesses to "work too hard" at their testimony. They try to cover too much ground in direct, and they are too calculating in cross-examination. Often these witnesses are busy anticipating where the cross-examiner is going and making preemptive efforts to head off the inquiry. To jurors, this conduct frequently looks like evasion or an attempt to outsmart opposing counsel. The effort can backfire and leave jurors distrusting the witness; jurors may start to "root" for the attorney who is dealing with an obnoxious witness.

Witnesses need to understand both the important points to defend and the points they can concede that will actually enhance their credibility. Witnesses may unwittingly magnify the cross-examination by projecting disproportionate import to a question that the jurors might otherwise have ignored.

Jurors are less likely to remember a flawed response than they are to recall an overall negative impression and draw a detrimental conclusion about the character of the witness. Some of the worst evidence is better dispelled by humility than by evasion or defensiveness.

Stage fright

Much anxiety for a witness is fueled by not knowing what is going to happen. The courtroom or deposition is a foreign setting for most lay people. Courtrooms are designed to intimidate and are built to house an adversarial confrontation. Even so, witnesses tend to do better when they know the physical setting.

Take, for example, the thoughtful, logistical preparation that one lawyer did with a young blind client. In the days preceding trial, the attorney and client visited the courtroom while court was out of session, and the client learned the path from the door to the witness stand, enabling him to walk unassisted. He learned the feel of the witness box, the sound of his attorney's voice from different locations, the position of the jury box and bench, how to sit in the witness chair and own that space, and how to leave the witness chair. He became so comfortable with the setting that later during his testimony, the attorney standing in the well tossed him a whistling football, which he caught while seated in the witness chair.

While we rarely have a blind client, the exercise of getting to know the stage is worthwhile for anyone. Visit the courtroom with the witness one afternoon when court is not in session, and take seats at counsel's table, at opposing counsel's table, the witness stand, and in the jury box. Let the witness, especially your client, know what the courtroom feels like from all vantage points.

But what do I do with my hands?

Lay witnesses are often nervous and may not know what to do with their hands, feet and bodies in general when called to testify. Practice helps witnesses learn to recognize behaviors that may distract the jury. Some witnesses may massage their hands, tap their feet, cover their mouths, tap their fingers, rock, grimace, grind teeth, smirk, and engage in myriad other activities which detract from testimony. During practice you have an opportunity to observe and help witnesses change these mannerisms.

Some lack of ease over sensitive issues makes sense and may even make testimony more compelling. But overt physical habits can undermine the credibility of the testimony and alert the observant lawyer or juror that something is amiss. Take seriously what you observe in preparation, probe further into the discomforting topic, and help the witness find tools to handle the unease. Assistance can be as simple as showing the witness where to place their hands, to keep feet flat on the floor, to sit up, make eye contact, and to breathe.

Focus on the jury

Parties often come to court prepared to "do battle" with the other side. Remind the witness that the reason for testifying is to share information with the jury. The witness is not testifying to express anger, outsmart the other side, or prove something to the judge. It is the jury who will make the decision in the case – not the other side, nor their lawyers. Shifting the focus to the jury often defuses a witness's anger and helps those who are especially guarded to open up.

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Where to look

Lawyers often ask witnesses to look at the jury when they speak. Typically witnesses need to feel comfortable with the questions and with their testimony in order to look away from the examiner and speak to the jury. When they recall that they are in court in order to share their story with the jury, it will be easier for them to look at the jurors. Some witnesses do so naturally; others can be directed with statements such as, "Tell the jury…" An attorney can help guide a witness by moving toward the jury box during the examination, or by standing at the end of the box so the witness turns toward the jury yet still maintains eye contact with the attorney.

Confidence

Confidence is an important factor in effective testimony. Explain to the witness that confidence in the story being told, confidence in the jury, and confidence in counsel will make the witness more effective. The witness is asking the jury to have confidence in *him*. If the witness fails to express personal confidence in the story, the jury will have a harder time believing him.

Confidence in the lawyer enables a witness to let go of any anger that may create a distance between witness and jury. It enables the witness to focus on the jury, knowing the attorney will conduct the battle with the other side.

Lawyers are right to be concerned that the witness not appear coached or *overly* confident – that the testimony remains fresh and authentic. Practice sessions, however, will usually enhance the witness's communication skills.

Preparing for cross

Not infrequently, a client (or friendly witness) is engaging and expansive on direct examination, then shuts down on cross. The contrast is glaring to a jury and tends to undermine the credibility of the witness.

The contrast in manner can be mitigated if direct is handled as more of a give-and-take between attorney and client. Reassure the witness that s/he need not cover all the bases at once – that the attorney can be relied on to ask follow-up questions. (At the same time, witnesses need to understand that attorneys cannot "lead them" in direct examination.)

If your witness tends to ramble, try an exercise where you first conduct an open-ended interview; then do another exercise in which the witness must limit his/her response to ten words or less. To identify and alleviate fears, try a pretrial exercise in cross-examination in which the client plays opposing counsel. If the practice is thorough and touches on all the sensitive areas, the witness at trial will already be familiar with potential questions and have considered appropriate responses. Additionally, these practice sessions may have a "sobering effect" on witnesses, particularly clients, who may begin to see weaknesses in their case that they might otherwise have ignored.

A note of caution: a tough practice session in which the client does poorly can injure the attorney-client relationship. In order to achieve the rigor of a tough exam, it is helpful to have another skilled and well-prepared attorney (or team member) conduct the practice cross-examination. Also, the inclusion of a consultant on the trial preparation team may allow new perspectives and even "constructive criticism" to be more easily expressed – without damaging the relationship with the client.

Pace of the case

An attorney achieves effective cross-examination by controlling the pace of the questioning and keeping the witness off guard. Witnesses can regain some control over the pace by learning to pause before answering and seeking clarification of poorly phrased questions.

Explain to the witness the natural inclination to quicken one's responses when questions are asked quickly. This tendency creates three problems:

- The witness does not take the needed time to think about the question and an appropriate response;
- The witness's lawyer does not have time to object; and
- The line between the question and the answer may blur, causing jurors to later recall the question posed as the witness's response.

The witness needs to understand that she will not be able to control the cross-examiner's questions; she can only control her answers and the tempo of the give-and-take.

Practice as therapy

Thorough preparation can have a therapeutic effect on the witness. Witnesses typically improve when an attorney gives them sufficient attention: when their fears are addressed and the judicial process is demystified. In the end, rigorous witness preparation helps the witness stay focused on telling the jurors the information they need to make the right decision.


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