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Winning at Deposition

with excerpts by **Bill Kanasky, Ph.D.**

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WINNING
at DEPOSITION

D. SHANE READ

CHAPTER THREE

Preparing Your Witness

> The fight is won or lost far away from witnesses. It's won behind the lines, in the gym, and out there on the road, long before I dance under the lights.
>
> —*Muhammad Ali*

Many clients think that a lawyer can save them from mistakes during a deposition or that the mistakes can be corrected later. Such conventional wisdom could not be more wrong. First, there is little a lawyer can do during a deposition to prevent a bad answer. Second, while it is true that the witness can make changes to the transcript after the deposition, any substantive changes can be used against the witness with devastating effect at trial. For example, at trial, opposing counsel could accuse the witness, "You changed your sworn deposition only after you consulted with your lawyer and realized that what you said the first time would really hurt your case."

In short, for all intents and purposes, deposition testimony *is* trial testimony. A bad deposition can't be fixed and can ruin a case. Indeed, Ali's quote about boxing is quite true for depositions. Primarily, the deposition is won or lost depending on how well you prepare your witness. Nothing can be done to win the deposition once it starts.

Unfortunately, the typical lawyer meets with his witness for thirty minutes or less prior to the deposition. The lawyer quickly explains how a deposition works and then goes over a few key questions and answers. Such practice is totally unacceptable and unprofessional. The reason is that cases are settled by the perceptual value of the deposition. To illustrate, if the plaintiff gives a bad deposition, the lawsuit's value drops dramatically.

Is that the plaintiff's fault, or yours? Did you prepare him well for the deposition? Attorneys too often take the easy way out and will explain that the plaintiff just "came across badly" while not admitting that, with better preparation, the plaintiff would have been more believable.

For a short deposition, a good rule of thumb is that you should spend *at least* one hour in a meeting with the witness where facts are discussed and another hour in a meeting preparing for deposition. You will need to spend more time with expert witnesses discussing the facts and their opinions. If you expect the deposition to last more than two hours, you should spend even more time. The truth is that you need to spend as long as it takes to get your witness ready.

Conventional wisdom also states that if you explain to your witness all the do's and don'ts learned from mistakes of previous witnesses, then your witness won't repeat them. One book published by the American Bar Association put this conventional wisdom into a list of rules for a witness to follow. It instructs that it is a list that "no lawyer should forget to bring to the woodshed the next time she is preparing a client." [1]

The list is known as "130 Rules for Every Deponent." The problem is most witnesses could not remember ten rules, much less 130.

A closer look at the 130 rules shows just how absurd the conventional wisdom is. Not only is the number of rules preposterous, but many are so contradictory that a witness would be hopelessly confused even if she were able to remember them. The confusion starts early in the list:

> **Rule 2**: Listen to the question. Pause. Think as long as necessary before answering.
>
> **Rule 3**: Don't pause too long before answering.

Witnesses who are told to pause before answering often will pause before answering even the simplest question. Such pauses convey the impression that the witness has something to hide because she is having to pause and think of an answer that is different from the truthful one that would have come naturally without a pause.

> **Rule 11**: Answer 'yes' or 'no' if appropriate.
>
> Rule 12: Don't answer 'yes' or 'no' to a yes-or-no question if the question cannot be answered accurately with yes or no.[2]

How is a witness supposed to know when to apply rule 11 instead of rule 12? There are many more examples:

> **Rule 21**: Be positive, assertive, confident, certain, strong, and precise.
>
> **Rule 22**: Or be quiet.
>
> **Rule 28**: Don't volunteer.
>
> **Rule 29**: Where appropriate, volunteer.
>
> **Rule 82**: Be Yourself.

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[1] Priscilla Schwab and Lawrence Vilardo editors, *Depositions* 65 (ABA 2006)
[2] Id. at 66.

It is hard to be yourself if you are trying to follow over a hundred rules.

RULE **110**: Bring what you need: checklists, key documents, notes.

RULE **111**: Bring only what I tell you to bring.

RULE **124**: Relax, but keep that edge.

RULE **125**: Don't relax. Stay wary and vigilant."

And after being given 127 rules to follow, you are given this one:

RULE **128**: Break the rules if you have a good reason.[3]

So many rules cause a witness to believe that she can't be herself but must act and answer in a way that is different from what comes naturally. She becomes so afraid of answering a question incorrectly that she won't answer the simplest questions for fear she is admitting something that will hurt the case.

In the following example, Boies questions Gates about an e-mail that Gates sent to Gary Stimac, an employee at Microsoft who was considering taking a job at IBM.[4] He qualifies his answers, is evasive, and does not answer simple questions. Perhaps Gates was inundated with rules to follow during witness prep, and he was trying to sort through all the rules before answering the questions.

Example: Witness Does Not Answer Simple Questions (Gates Deposition)

[Boies show Gates an e-mail he wrote to Stimac]

Q. This relates to a conversation you had with Gary Stimac, is that correct?

A. Not strictly. [There is no need for Gates to qualify his answer here; he should just answer the question.]

Q. Does it relate in part to that?

A. Yes.

Q. And did Mr. Stimac tell you [in the e-mail] that he was thinking about taking a job with IBM?

A. I think he did.

Q. And did he tell you that one of his concerns was whether IBM's relationship with Microsoft would be a problem?

A. I see that in the e-mail. I don't remember it specifically. [There is no need for Gates to qualify his answer by saying that he doesn't remember. The question is asking what Gates said in the e-mail]

Q. Do you remember people at IBM being concerned about IBM's relationship with Microsoft being a problem?

A. No.

Q. Do you remember Mr. Stimac telling you [in the e-mail] that he was concerned about whether IBM's relationship with Microsoft would be a problem either here or—or at

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[3] Id. at 66-72.

[4] A summary of the trial can be found in Appendix One.

any other time?
A. No, I don't remember that.

Q. In response to that you say that you told him that "the Java religion coming out of the software group is a big problem." Do you see that?
A. Uh-huh.

Q. Did you tell Mr. Stimac that [in the e-mail]?
A. I don't remember telling him that. [Again, Gates does not answer the question. Boies is asking Gates about the e-mail, not what Gates may have told Stimac in addition to the e-mail. If Boies had felt it was important to nail Gates down on this issue, he could have followed up. However, Boies wanted to get to the heart of the questioning which follows.]

Q. Now, when you talk about the Java religion coming out of the software group, you were talking about IBM's software group, correct, sir?
A. I'm not sure.

Q. Well, this sentence immediately follows Mr. Stimac purporting to be concerned about whether IBM's relationship with Microsoft would be a problem and immediately precedes a sentence in which you say you told him that IBM refused to buy anything related to Backoffice.
A. Yeah. That doesn't relate to the IBM software group.

Q. But it relates to IBM, correct, sir?
A. Yes.

Q. This whole paragraph relates to IBM; correct, sir?
A. Primarily. [Again, there is no need to qualify the answer.]

Q. So when you say that you told Mr. Stimac that the Java religion coming out of the software group is a big problem, do you really have any doubt that you were talking about IBM's software group?
A. Well, there was a lot of joint work between IBM's people and Sun's people and other companies, and so it's very hard to draw a line between the IBM software groups and other people's software groups. [This is another disingenuous answer.]

Q. Does that mean that it is your testimony here under oath that when you refer to the software group in this sentence, you don't know whether you were talking about the IBM software group?
A. I'm certainly talking about software groups that IBM is at least a part of. [Gates finally answers the question but can't help himself and still qualifies his answer.]

Throughout his deposition, Gates hedged any answer he could. While he thought he was being clever, others saw that he could not answer a simple question. When a witness can't answer a simple question, a jury will always believe he has something to hide even if he doesn't.

3.1 THE WITNESS INTERVIEW

Conduct a witness interview and the deposition preparation at separate meetings. Otherwise, the goals of the two meetings can become confusing for the witness. Ideally, the witness interview will occur long before there is any hint of a deposition. That way, the witness won't be distracted by the upcoming deposition. At the witness interview, your main goal is to learn what the witness knows and does not know. It is okay to admit to the witness that you are just learning about the case and need his help. This often causes the witness to be more helpful to you.

> Bring to the meeting any relevant document that has the witness' name on it or mentions him so it can be reviewed.

Does the witness need to meet or talk with other witnesses to help him remember what happened? Often this is useful. If the meeting will help uncover the truth, it is a good idea. If it will result in witnesses coming up with the same "story," you have obviously made a huge mistake. If the witnesses meet together, you must be very vigilant to prevent a uniform story that is not true. Demand that they tell the truth. Also, reassure them that differences in opinions and memories are normal.

Also, unless you are present and all the witnesses are your clients, the discussions are discoverable. To illustrate, at a deposition, the witness could be asked: 1) whom did you talk to about this deposition and 2) what did you and the other witness talk about.

A second goal is to calculate how believable the witness' story is. It is also a chance for the witness to become comfortable with your litigation style and competence.

3.2 THE DEPOSITION PREP MEETING

Here, the goal is for the attorney to teach the witness how to tell the truth in a confident manner and to protect the witness from opposing counsel's tactics that would undermine that goal.

First, relieve your witness' anxiety. Before you launch into your questions, ask if he has any. He probably will have a couple from this list: how long will it take, can they ask me anything, what do they want from me, what if I make a mistake, what is your role, and do you have a strategy?

By the deposition prep meeting, you should know the case inside and out. Success in a deposition is a simple matter of putting in the time to prepare. You must know the *entire case* inside and out. The witness must know the *key parts* of his testimony inside and out. Project confidence. Relieve the witness'

> Preparation is the key. Lincoln said: "If I were given the task of chopping down a tree and was told it would be an eight-hour job, I'd be sure to spend the first six hours sharpening my axe.

fears by telling him that he is a small piece of a large puzzle. Even if the witness is one of a few key players, you can relieve his anxiety by making him feel that the whole case does not rest on his shoulders. Usually, there is at least some other evidence to support your case in the form of witnesses or documents.

The worst thing an attorney can do is lecture the witness about the do's and don'ts of a deposition (see discussion above). Instead, use your trial guide to help you focus on what is most important. Chapter Two explains the trial guide in detail, but it is reprinted here for your convenience. Remember, don't show the witness any document---particularly the trial guide---that you are not afraid for the witness to turn over if asked at the deposition what documents he relied on to prepare for the deposition.

TRIAL GUIDE	
A. Your Theme	A. Opponent's Theme
B. Your Theory	B. Opponent's Theory
C. Most Important Facts 1. 2. 3. 4. 5. *Reference the source of each fact (i.e. does it come from a witness or a document)	C. Most Important Facts 1. 2. 3. 4. 5.
D. Most Important Exhibits	D. Most Important Exhibits
E. Legal Elements of Claims/Defenses	E. Legal Elements of Claims/Defenses

Even if you had a short and correct list of the mistakes to avoid, a lecture is not the proper format. Instead, make sure the witness is involved in the discussion with you. To do this, pepper your conversation—not lecture—with questions to make sure the witness is engaged. For example, you might ask the witness not only if he understands what you just said, but ask him if he has any questions.

Since the witness is probably just trying to get through this meeting as quickly as possible, he likely won't have many questions for you other than how a deposition works. But he is more likely to engage you the more opportunities you give him. Also, ask if there are questions he is concerned about being asked.

A response by the witness would provide a great launching pad into further discussion about what to expect at the deposition and how to meet it.

To make the witness comfortable, nothing is more important than to have the witness practice answering the tough questions. You can only do this if you have studied your case and made a concerted effort to see the case through the eyes of opposing counsel. For example, determine the weaknesses in your case and the line of questioning your witness can expect. You can provide your witness even better information if you have seen opposing counsel's strategy from previous depositions.

In addition, determine the important documents in the case. Don't let the witness see them for the first time during a deposition when he is nervous. Review them ahead of time, and you will go a long way toward relieving the witness' anxiety. But realize that anything you show is probably discoverable by opposing counsel (see discussion below on privilege). One trick is to show your witness many documents and then just focus on a few. That way, when opposing counsel asks what documents were reviewed, the witness can truthfully refer to a large stack of documents. Even if opposing counsel discovers the documents, it is no big deal, since he probably already knew about them, and the reward of getting your witness prepared is worth the risk of disclosure to the other side.

Furthermore, tell your witness not to create any notes between now and the deposition. Although the witness might be tempted to compose an outline to help his memory, such a document becomes discoverable.

Another trick to help your witness relax is to describe opposing counsel's personality. Is he soft spoken, belligerent, unprepared, aggressive, straightforward, deceptive, vague, organized, or does he jump around from topic to topic? Whatever the case may be, your witness will be more at ease if you can analyze opposing counsel's strategy—or lack thereof—and instruct your witness how to react.

You may have heard the saying about someone who talks too much. If you were to ask him what time it is, he would tell you how the watch was made. Volunteering information is one of the worst things a witness can do. Opposing counsel's goal is to get as much information as possible. The more information your witness gives to the attorney, the more likely the witness is going to reveal important information that the attorney did not know to ask about. Witnesses are under the mistaken belief that if they volunteer facts, the deposition will end sooner. But just the opposite happens. Armed with additional

> We are masters of the unsaid words, but slaves of those we let slip out.
> —Winston Churchill

information, opposing counsel will simply ask more questions.

For example, if the attorney asks, "Where do you live?", answer, "Chicago." There is no need to volunteer that you live near downtown in a two bedroom apartment in a high-rise and the address is _____. For more complicated questions, tell your witness that if he speaks more than a couple of sentences he is probably talking too much.

Moreover, teach the witness through examples specific to your case that he can comfortably respond, "I don't understand the question," "I don't remember," and "I don't know." Most witnesses are fearful that they are supposed to be able to recall events that occurred months or years before. They will be very relieved when you assure them that such a feat is usually impossible and not expected of them. Also, tell the witness that if he gets too uncomfortable, he must answer the question but it is then up to him—not you—to ask for a break.

The most important rule you can teach your witness is: "Tell the truth. You know what you know. You don't know what you don't know. Don't guess!" Instructing your witness to "tell the truth" is not only the legally and morally right thing to do, it is also the best thing for your case. The sooner you learn about a problem, the easier it is to fix. Besides, if the other side proves before a jury that your client has lied, your case will be severely damaged—much more so than if your client had revealed to you the truth that she thought would hurt her case.

Teaching your witness not to guess is critical. If your witness guesses and is wrong, that wrong guess has now become a lie. To illustrate, suppose your client is at a meeting and the question is whether Robert discussed "X." (he didn't). If your client guesses "yes," it was discussed when he is not certain, then opposing counsel will be able to assert your client is lying when Robert and a document showing the minutes of the meeting reveal that there was no such discussion. If opposing counsel can suggest that your witness has lied, your case will be weakened considerably.

Since these instructions are so important, mention them at the beginning and end of your meeting because that is when people pay most attention.

In addition, alert your witness to questions that contain superlatives such as "always" and "never." Superlatives are used by lawyers to box a witness into a corner. Your witness needs to be very careful before answering such questions.

Finally, opposing counsel will often ask the witness if he has met with his attorney prior to the deposition. Some witnesses freeze because the question is phrased in a somewhat accusatory fashion and so they will lie and say, "no." Remind your witness that it is perfectly fine that you have met with him. Also, instruct him not to talk to others about the deposition as

that may draw more people into the lawsuit should the witness be asked if he spoke with people other than his attorney.

Remember

The most important rule you can teach your witness is: "Tell the truth. You know what you know. You don't know what you don't know. Don't guess!"

3.3 COACHING

"The adversary system benefits by allowing lawyers to prepare witnesses so that they can deliver their testimony efficiently, persuasively, comfortably, and in conformity with the rules of evidence."[5] But, the lawyer's duty "is to extract the facts from the witness, not to pour them into him; to learn what the witness does know, not to teach him what he ought to know."[6] Indeed, the District of Columbia Bar issued an ethics opinion concerning the preparation of witnesses for trial. It concluded that "a lawyer's suggesting actual language to be used by a witness may be appropriate, as long as the ultimate testimony remains truthful and is not misleading."[7]

In short, if the substance of the witness' testimony comes from the witness' version of events instead of from you, you have not improperly coached the witness. Let your conscience be your guide when deciding how much advice you want to give your witness. Also, when there are moments when the witness is questioning how to phrase something or becomes frustrated, you can assist him in coming up with a phrase he is comfortable with but also remind him simply to "tell the truth." Obviously, don't cross the line and say, "You've got to say _____ or we can't win."

Practice Tip

To make sure you don't improperly coach the witness, imagine that the witness is secretly recording your advice. Don't say anything you would not be proud of if one day it were made public.

[5] Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardoza L. Rev. 1 (Sept. 1995).
[6] *In re Eldridge*, 37 N.Y. 161, 171 (N.Y. 1880).
[7] District of Columbia Bar, Legal Ethics Comm., Op. No. 79 (1979).

For a very interesting and detailed discussion of those times attorneys cross the line into prohibited conduct, read *The Ethics of Witness Coaching*.[8] That article provides multiple examples and research to analyze how and why attorneys improperly coach witnesses. For the purposes of this book, all you need to know is the obvious: never sacrifice your integrity to win a case. In addition, being honest actually helps you win, not lose. Nothing will destroy your case sooner than a witness who shades the truth. Nine times out of ten, the truth will eventually come out, and your witness' credibility—not to mention your own credibility even if you are an unwitting participant—will be destroyed.

3.4 NON-RESPONSIVE OBJECTIONS

Prepare your witness for the primary objection the examining counsel will make: objection, non-responsive. The attorney will make this objection when he thinks the witness has not answered the question he has asked. One possibility is that your witness is dodging the question. If opposing counsel keeps asking the question, you might want to jump in and simply tell your witness to answer the question. It depends on the situation.

But it is often the case that your witness has answered the question well and opposing counsel simply doesn't like the explanation given. So, to get the answer he wants, opposing counsel will say, "objection, non-responsive" and ask the question again hoping to get a different answer. Teach your witness to stick to his guns and not change his answer just because there is an objection.

3.5 PRIVILEGE

A critical step in preparation is having your client review documents that will refresh her memory about the case. But be careful not to show the witness privileged documents, and be aware that the other side may very well be entitled to review any documents your witness reviews in preparation.

The reason for this caution is the interplay between Rule 30(c) and Federal Rule of Evidence 612. Rule 30(c) states that the examination at a deposition is like that at trial, while Evidence Rule 612 states that a court—in the interests of justice—may require a witness to produce documents used to refresh her recollection prior to testifying or when testifying. While there is a wide range of judicial opinions, the safe way to proceed is to assume that anything you show your witness in preparation for the deposition is discoverable.

[8] Richard C. Wydick, *The Ethics of Witness Coaching*, 17 Cardoza L. Rev. 1 (Sept. 1995).

3.6 ENLIST THE HELP OF A TRIAL CONSULTANT

Witness performance can have a lasting impact on the case. Dan Petrocelli, the plaintiffs' attorney in the civil wrongful death case against O.J. Simpson had this to say about the defendant: "Simpson did not live up to his billing as a charming, seductive communicator. He didn't look good as a witness. He slumped in his chair, stared vacantly, delivered answers robotically, and showed no energy, no punch. He did not take this deposition as an opportunity to sell his innocence."[9] Likewise, Bill Gates did little to help his case by the way he arrogantly refused to answer simple questions and appeared evasive.

The truth is that lawyers are sometimes not the best qualified people to prepare a witness. Not surprisingly, many great trial lawyers have a trial consultant to help them for all aspects of a trial, including preparing witnesses for depositions. A trial consultant can be critically important in getting key witnesses ready for deposition and trial. Gates and Simpson could have certainly benefitted from an effective trial consultant.

While lawyers are very effective in preparing a witness by focusing on the substance of the testimony, attention also needs to be paid to having a witness actually convey information in a clear and persuasive manner. There is an enormous difference between *telling* a witness that she needs to give "more concise" answers vs. *teaching* her how to give concise answers. Some attorneys struggle to assess and teach communication skills adequately. On the other hand, trial consultants have formal training in psychology and communication science which can greatly assist in this area.

There are several reasons that trial consultants are not used in cases. First, some attorneys are very effective at witness preparation. Others are unwilling to admit their weakness in this area. Also, companies have the mindset that they cannot afford a top-level witness to take time away from work for the extra training provided by a trial consultant. In addition, some clients are reluctant to pay a trial consultant's expenses on top of attorney's fees. But making the time for a witness to get properly prepared and paying a trial consultant's fee may be the best decision you make if it prevents a horrible deposition that sinks your case.

Finally, some companies fear that if the practice session is videoed, the video may get leaked even though there are likely safeguards in law (check your jurisdiction) and technology to prevent such an occurrence. In any event, you should at least explore the use of a trial consultant for witness preparation when practical. To give readers a sense of the invaluable insights

[9] Daniel Petrocelli, *Triumph of Justice* 178 (Crown 1998).

a trial consultant can provide, Bill Kanasky Jr., Ph.D. from Courtroom Sciences Inc. (www.courtroomsciences.com) shares his thoughts below.[10] Dr. Kanasky is one of the nation's top experts on witness communication.

3.7 VOLUNTEERING INFORMATION

The most common and preventable witness blunders include volunteering information, guessing and not listening or thinking effectively. Let's take each in turn.

Volunteering information occurs when the scope of a witness' answer exceeds the scope of a question from opposing counsel. This common mistake occurs for three reasons. First, witnesses who are anxious and unfamiliar with the legal environment tend to fall back on their work and social communication skills to help them "survive" the testimony. At work, home or with friends, it is perceived as friendly, helpful and efficient when someone offers extra information following a direct question. Therefore, novice witnesses inadvertently volunteer excessive information, thinking that it will be helpful, unknowingly causing tremendous potential damage. Second, many witnesses purposely try to anticipate the next question or questions, in an effort to bring the testimony to a close more quickly. These individuals erroneously conclude, "The more I say, the faster this uncomfortable process will be over with." Nothing could be further from the truth, as an opposing counsel will actually question a "chatty Cathy" witness longer than a witness who volunteers less information. Third, witnesses experience an intense, internal urge to explain away answers to simple, direct questions. They feel that if they don't, they are letting down the team and hurting the case. The classic, "Yes, that is true, but here is why" type of answer from a witness is particularly damaging, as the unsolicited explanation fuels opposing counsel's attack.

3.8 GUESSING

Guessing comes in many forms, and witnesses often take educated guesses instead of stating that they "don't know," "don't remember" or "don't have any personal knowledge of that." Why

[10] Bill Kanasky Jr., Ph.D. is Director of Litigation Psychology at Courtroom Sciences, Inc. (CSI), one of the top litigation consulting firms in the country with offices in Dallas and Chicago. In addition to his duties at CSI, Dr. Kanasky is a highly sought after speaker on witness communication at major corporate law departments, law firms and national organizations.

do witnesses so often opt to guess rather than admit not knowing something? Two reasons: embarrassment and intimidation. Many witnesses feel embarrassed if they can't provide an answer to what is perceived as an important question, and attorneys are experts at creating this powerful emotional reaction. The standard trick is to say to a witness, "You've been an employee at Company X for 15 years and you can't answer my important question? My client has a right to an answer. Let me repeat my question, and let me remind you that you are under oath." At this very point, 99 percent of witnesses take an educated guess, simply because they feel compelled to correct the perception that they don't know. They end up feeling obligated to provide "something," regardless of its accuracy or relevance.

Intimidation is also a powerful tool. Attorneys can raise their voices, increase the pace of questioning and become sarcastic or aggressive towards witnesses and "bully" them into answers. When this occurs, a witness becomes scared, rattled and very uncomfortable. The witness then provides an educated guess in an effort to give the attorney "something" so that he will back off. Regardless of the cause, guessing is a devastating witness blunder, which leaves an attorney and a client vulnerable. Guesses are rarely accurate, and a savvy attorney can use a witness' guesses against him or her, heavily damaging that witness' credibility and believability.

3.9 NOT LISTENING OR THINKING EFFECTIVELY

In today's high-speed, instant-gratification society, people are now cognitively hard-wired to listen and think simultaneously when communicating with others. In other words, when someone asks a question, the respondent automatically begins to think about his or her response in the middle of the questioner's inquiry, rather than listening to 100 percent of the question, then thinking 100 percent about his or her response. From a neuropsychological standpoint, a respondent is extremely vulnerable to error, as concentration and attention are split between two activities—listening and thinking—instead of dedicated to one cognitive activity. While this pattern is efficient and friendly in the workplace or social settings, it is extremely dangerous in a legal environment.

Listening and thinking simultaneously as a witness results in

poor answers because the witness does not hear the question in its entirety. What happens next is that the witness answers: 1) a different question than what was actually asked, which makes the witness appear evasive; 2) a question incorrectly, for example, inadvertently accepting the questioner's language and agreeing with a statement that isn't true; 3) a question that shouldn't be answered in the first place—questions to which an attorney would raise form or foundation objections; or 4) a question beyond the scope of the inquiry, which volunteers information and makes the witness appear defensive.

3.10 COMMON EMOTIONAL MISTAKES WITNESSES MAKE

There are four potent psychological landmines that will damage your witness's credibility every time: Anxiety, Anger, Arrogance, and Apathy. One or more of these factors routinely results in major headaches for trial attorneys attempting to prepare their witnesses for deposition or trial testimony. The good news: all of these are detectable and fixable. Let's take a closer look.

1. Anxiety

By far the top barrier to effective communication, anxiety can conceal a witness's true character, motivation and credibility. Even worse, the physical and psychological symptoms of anxiety send a message of "I am not prepared, I am scared, I am intimidated, and I have no confidence in my answers." To achieve the perception of credibility, witnesses need to be confident, assertive, and professional---and anxiety will destroy all three, and thus destroy credibility. Some level of anxiety is normal, and perhaps good, as we want the witness to be "on his toes" during questioning. The Answer: thoroughly evaluate the witness's anxiety levels and find the source; often the source of the anxiety is deep-rooted and is completely unrelated to the case.

2. Anger

Many witnesses are pretty ticked off that they have to go through the legal process, and many are furious because they feel that the case has no merits. Angry witnesses are very dangerous, as they can exhibit volcanic and random outbursts, a tendency to "jump the gun" in defending themselves, and an overuse of sarcasm. Plaintiff attorneys love angry defense witnesses, as their anger severely impairs their communication skills and

subsequently wipes out their credibility. Courtroom Science Inc. interviews over 5,000 jurors annually who say: "poise, composure, and professionalism = credibility." The Answer: give the witness the opportunity to vent and process his anger before his testimony preparation; let him blow off steam, let him heal, and then proceed with preparation.

3. Arrogance

Want to get a jury really mad at you? Have your witness display arrogance...works every single time. This is a major problem with higher level witnesses (i.e., C-level executives, managers, celebrities, physicians, etc). The strategic (and economic) cost of arrogance is very high, as the testimony becomes immediately and permanently poisoned. On paper, these should be the most credible and effective witnesses of all, given the high levels of intelligence and professional achievement involved. The problem is that in the business world, a good dash of arrogance may not only be beneficial to one's career, it may even be necessary for professional survival. The Answer: carefully remove arrogance (without interrupting confidence/assertiveness) and carefully insert a dose of humility (but only a moderate amount).

4. Apathy

So your witness has no passion? No conviction? No motivation? Guess what?—he has no credibility either. Apathy typically occurs because the witness doesn't care about you, your case, or the consequences. Apathy is particularly problematic with witnesses that are no longer tied to the defense (i.e., former employees). This makes sense, as the witness has to do all of the work, go through the grueling litigation process, put up with all of your phone calls and demands, and then receive no reward in the end. Sounds fun to me, where do I sign up? The Answer: make the process worth their while; create internal and emotional rewards that will be appealing.

Anxiety, anger, arrogance and apathy all negatively impact your witness's credibility at the jury level, even if he is telling the truth! All too often, these factors are ignored, underestimated and given little or no attention in the witness preparation process. In fact, the vast majority of these problems are first detected during the deposition, when everything is on the record and each mistake hurts.

3.11 SPECIAL CONSIDERATIONS FOR CORPORATE REPRESENTATIVES

For the moment, let's interrupt Dr. Kanasky's discussion so that another important issue can be discussed. Under Rule 30(b)(6), a party may name as the deponent a corporation, partnership, association, or other entity as long as reasonable particularity of the subject of the deposition is given. The named organization must then provide a witness who is capable of testifying about the information. The deposition notice typically asks for a representative to provide information on a vast array of a company's policies and procedures. This type of deposition is so common that it is commonly referred to as a "30(b)(6) deposition."

However, while the deposition may be common, preparing a witness for one presents special challenges. Sometimes the witness for the 30(b)(6) deposition is testifying to routine matters. Other times, the stakes are very high. The corporate representative may be the one who has made the decision to hire you as his attorney or certainly has influence over a decision to keep you hired after the deposition. Not only is your financial interest at stake, but the fate of the lawsuit can rest upon whether or not the corporate representative is believable.

Unfortunately, there is no way to prepare such a representative for a deposition in the short amount of time that most attorneys allow. An afternoon meeting—or worse, a meeting an hour before the deposition—simply can't get your witness adequately ready. This is particularly true when a corporate rep. is arrogant. Telling a witness one or a hundred times not to be arrogant isn't effective. The reason is that people who are arrogant often don't see themselves that way. Throughout this book we have seen examples from Bill Gates' deposition. Although he was technically a defendant, and not a corporate representative, he is the perfect example of an arrogant person who is the face of his organization. His demeanor did more to hurt his case than any answer he gave.

In a high stakes case, a trial consultant can put a witness through a sophisticated training program that focuses on the non-legal aspects of testimony (legal communication science, litigation psychology, non-verbal communication, emotional control, and attorney psychological tricks/traps). A consultant can also educate him about the way jurors make and do not make decisions. A witness is usually very surprised to find out that jurors highly value the rep's attitude, tone and body language, rather than the intricate parts of his answers. In other words, a witness needs to understand that he will never convince jurors that he is correct through substance alone and that arrogance is the top killer of credibility.

In the remainder of this section, let's return to Bill Kanasky Jr., Ph.D from Courtroom Sciences Inc. Below, he shares his thoughts on the challenges facing attorneys with this difficult type of deposition.

> There are three special challenges in preparing a corporate representative to testify. First, when corporate representatives are designated, they feel that they are being put into a "know it all" position, which is not realistic or practical. While the amount of study time and preparation time dwarfs that of a regular fact witness, 30b6 witnesses need to be told that they are not required to know every detail of the company's history and operations (it is impossible). They need to demonstrate the skills of a leader by clarifying what is delegated to whom and why. They need to be seen as confident leaders who know how to organize talent and keep lines of communication flowing. They do not have to suddenly become an expert at finance, operations, IT, sales, marketing, or any other functional area. If they try to be an expert on every topic, they will not come across as credible or believable.
>
> Second, many, if not most executives got to their positions of status by being more aggressive than their colleagues. Along the way to the corner office they learned that conflict-seeking and even occasional aggression gets rewarded. They may have a personal style that is genteel or diplomatic, but when push comes to shove under cross they are very likely to revert to the idea that the best defense is a good offense, resulting in intense defensiveness and argumentativeness. Those traits do not promote credibility or believability during sworn testimony. Third, they despise litigation and hate attorneys—even their own! They see legal issues and attorneys as necessary evils that are extraordinarily expensive. These emotions affect their willingness to take advice in witness preparation sessions and to be calm during a deposition.
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> If you could tell a corporate representative only one thing in order to prepare him for a deposition, it should be: "You don't have to be perfect on substance; but you MUST be perfect on demeanor and professionalism." (i.e., anything related to substance can be "fixed" with more questioning; but if a corporate representative comes across as arrogant, angry, scared, anxious, or apathetic, the entire corporation will be perceived that way at trial. The corporate rep's demeanor and professionalism is the

face and heartbeat of the entire corporation). Put another way... "deposition testimony is indeed trial testimony."

There are three common mistakes corporate representatives make in a deposition. First, they try to win with every answer instead of just answering the questions honestly. Second, they do not utilize their rights as a witness: 1) asking for questions to be restated/rephrased; 2) being patient before answering; and 3) asking to review a document before answering. Third, they forget that their demeanor/character is just as valuable as the substance of their answers.

3.12 EXAMPLES FROM GATES DEPOSITION

Finally, let's look at a few more examples from the Gates deposition. While the entire deposition is a treasure trove of what not to do as a witness, here are some of the highlights.

Example: Gates Is Not Sincere (Gates Deposition)

You want your witness to come across as sincere and likeable. However, in the heat of the deposition it is easy to forget about this goal. Below, Gates comes across as a smart-aleck as opposed to a sincere witness. The video portion of this deposition is discussed in Chapter Ten (clip 7) and can also be seen at www.winningatdeposition.com.

[Attorney Stephen Houck] Q. The Microsoft computer dictionary, 1997 edition, defines killer app as follows, and it gives two definitions. And I'll be very complete this time, Mr. Gates. The first definition is, "An application of such popularity and widespread standardization that fuels sales of the hardware platform or operating system for which it was written." Do you agree with that definition?

A. Are you saying to me that there is more in there and you're just reading me part of it?

Q. I'm going to read you the second definition as well.

A. So you're asking me about it without reading me the whole thing?

Q. No, sir. There's two definitions. You're familiar with dictionaries, I take it? Sometimes they have more than one definition of a term; correct?

A. Sometimes terms have more than one meaning, so it's appropriate that dictionaries would give the two different meanings. And generally before you'd ask somebody if they agreed with the dictionary, you'd actually give them the benefit of reading them what is in the dictionary, not just a part of it.

Q. I read you the first definition and asked you if you agreed with that definition.

A. I don't think it's the only definition.

Q. Is that an accurate definition?
I'd like to hear what the other –

Gates was asked a simple question that had no trickery in it. But he thought he would be clever and try to show that the lawyer was asking a deceitful question. Even when the lawyer recited the entire definition below, Gates still did not give a straight answer.

Q. I'll read it to you. The second definition is "An application that supplants its competition."
Q. Let me go back and read you the first definition again, now that you've heard both of them. The first definition reads as follows: "An application of such popularity and widespread standardization that fuels sales of the hardware platform or operating system for which it was written."
A. I already told you that my definition of killer app is a very popular application. [Gates does not answer the question.]

Q. Is this definition accurate?
A. I told you, when I use the term "killer application," in particular when I use it in a piec of e-mail, what I mean by it— I'm sure there's people—[Gates still does not answer the question.]

Q. I understand. You've told me that, but there's another question on the table. Do you have any disagreement with this definition?
A. I think most people when they use the word "killer app" are not necessarily tying it to any relationship to hardware. [Gates still doesn't answer the question.]

Example: Gates Refuses to Answer Simple Question (Gates Deposition)

Boies questioned Gates on his knowledge of Netscape's revenues. Given Microsoft's dealings with Netscape, this was something he certainly had some knowledge about. In fact, after this excerpt, Gates admitted that he had asked his assistants to get this information for him. Notice how his refusal to answer simple questions makes it seem as though he was being deceitful.

Q And in 1996 what were Microsoft's revenues compared to Netscape's revenues?
A. I don't know Netscape's revenues.

Q. Approximately, sir?
A. Approximately what? [too argumentative]

Q. Approximately what were Netscape's revenues compared to Microsoft's revenues?
A. You want me to guess at Netscape's revenues?

Q. I want you to give me your best judgment and estimate as a chairman and CEO of

Microsoft, sir. If you call it guessing, you can call it whatever you want. What I want is your best estimate under oath as you sit here?

A. I know that Microsoft's revenues would be dramatically higher than Netscape's, but I—I really won't want to hazard a guess at Netscape's revenue in particular.

Q. As you sit here now, can you give me any estimate or range at all of what Netscape's revenues were in 1996?

A. Zero to 200 million.

Q. As you sit here now, can you tell any estimate or range of what Netscape's revenues are today?

A. I think zero to 500 million. [This answer and the preceding one are needlessly argumentative and absurd on their face.]

Q. Can you be any more specific, that is, can you narrow the range at all?

A. Yeah. 200 million to 500 million.

Q. Can you narrow the 1996 range at all? The 1996 range you gave me was zero to 200 million.

A. 30 million to 200 million.

Q. Is that the best you can do as you sit here now?

A. Well, the chance of my being wrong goes up as I narrow the range.

Example: Gates Argues with Boies (Gates Deposition)

The attorney David Boies was asking Gates about an interview he gave to reporters where he talked negatively about Netscape. Netscape had complained that Gates' public comments had negatively affected its business.

Q. Let me ask you a different question. Do you believe that the publication of this article and, in particular, the publication of the statement attributed to you . . .'Our business model works even if all Internet software is free,' close quote, . . .quote, 'We are still selling operating systems. What does Netscape's business model look like if that happens? Not very good,' close quote. Do you believe that the publication of that statement affected Netscape?

A. I know when people have been quoted in the press, competitors, saying how—what trouble Microsoft is in and how much better their products are . . . .

Q. [Boies]I'll move to strike the answer as nonresponsive. [to the court reporter] Would you read the question again please? (The following question was read: "Q Do you believe that the publication of that statement affected Netscape?")[Gates] What do you mean "affected Netscape"?

Q. Are you telling me you don't understand the question, sir?

A. Yes, that's what I'm saying to you.

Q. Okay. By "affected Netscape," I mean adversely affected Netscape.

A. Like hurt their feelings, somebody cried, or somebody in reading the article smiled?

Q. Are you saying that you don't understand what I mean by "adversely affected Netscape"?

A. No, I don't know what your criteria is. I think it's likely somebody may have read it and disagreed with it.

Q. Do you think it adversely affected Netscape's business prospects?

A. I think the general work that we were doing to do strong Internet software had an effect on Netscape, but I don't think quotations like that had any direct effect.

Gates would have been much more believable and likeable if he had just answered a simple question. His smart-aleck answer in bold above and his pretending not to know the "criteria" of a simple phrase, "adversely affected," undermine his credibility. While Gates might get some pleasure from being a difficult witness at the deposition, he would not be rewarded for such behavior by the judge at trial. Gates' bad deposition cost Microsoft millions of dollars.

CHECKLIST

Preparing the Witness

1. Conduct two meetings: the first is fact finding and the second is preparation for the deposition.
2. Most attorneys don't prepare enough. Two hours minimum are needed.
3. Don't lecture witness but have a conversation instead.
4. Use your trial guide to help you focus on what is important.
5. Practice answers to difficult questions.
6. Tell witness: "Tell the truth and don't guess!"
7. Tell witness that you can handle any bad fact if you know it soon enough. But if witness lies, it will destroy the case.
8. Assume any documents you show witness will have to be turned over if other side requests at deposition.

Witness' Common Substantive Mistakes

1. Problem: volunteering information.
   Solution: tell witness if he uses more than two sentences, he is probably talking too much.
2. Problem: guessing.
   Solution: teach witness that he should not feel obligated to guess if he doesn't know the answer.
3. Problem: not listening to question.

Solution: teach witness to listen to entire question instead of thinking about his answer while attorney is in the middle of the question.

Witness' Common Emotional Mistakes

1. Problem: showing anxiety
   Solution: thoroughly evaluate the witness's anxiety levels and find the source; often the source of the anxiety is deep-rooted and is completely unrelated to the case.
2. Problem: becoming angry.
   Solution: give the witness the opportunity to vent and process his anger before his testimony preparation; let him blow off steam, let him heal, and then proceed with preparation.
3. Problem: being arrogant.
   Solution: carefully remove arrogance (without interrupting confidence/assertiveness) and carefully insert a dose of humility (but only a moderate amount).
4. Problem: displaying apathy.
   Solution: make the process worth their while; create internal and emotional rewards that will be appealing.

Special Considerations for Corporate Representatives

1. Allow extra time to prepare witness.
2. Relieve witness' anxiety that he must know everything.
3. Corporate reps tend to be aggressive which is disastrous in deposition.
4. Corporate reps don't like lawyers and are often unwilling to take advice.
5. Corporate reps forgetting their demeanor in answering questions is just as important as the answer.
6. Corporate reps try to win with every answer instead of answering honestly.

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