PREPARING YOUR CLIENT TO TESTIFY

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RECOGNITION BY THE MEDIA:

- Selected as a "Texas Super Lawyer", 2003, 2004, 2005
- Selected as one of the Top Five Family Law Attorneys in Texas by *Texas Lawyer, October, 2002*
- Selected as one of America's Top Ten Divorce Lawyers by *Town & Country Magazine,* January 1998 .
- "The Best Lawyers in Houston", *Inside Houston*, July 1998.
- Profiled in the *Houston Business Journal*, February 27, 1998.
- Referred to as one of the best divorce lawyers in America in articles in *Town & County,* May, 1985, Sept., 1991; *Houston City Magazine,* Nov. 1982; *Ultra* Magazine, Dec. 1985; *Harper's Bazaar,* Aug. 1987; *The National Law Journal,* Nov. 1987; and *Houston Business Journal*, March 1991; Selected as a 'Houston Top Lawyer' by *H Texas Magazine* 2004, 2005.

RECOGNITION BY FELLOW LAWYERS FOR DISTINCTION:

- Inducted into the Texas State Bar "Hall of Legends", August, 2004
- Rated "a.v." lawyer by the *Martindale Hubble* National Lawyers' Listing for more than 35 years.
- Listed in all ten editions of *The Best Lawyers in America*, Naifen and Smith, 1987 Woodward/White, 1987-2004.

INVITATION TO SELECT LEGAL ORGANIZATIONS THROUGH PREEMINENT SKILL:

- Advocate, The American Board of Trial Advocates, 1998 (having exceeded 50 jury trials).
- Diplomat - American College of Family Trial Lawyers, 1994 to present.
- Fellow, International Academy of Matrimonial Lawyers
- Fellow of the American Academy of Matrimonial Lawyers; National President 1989-90.

PROFESSIONAL ACTIVITIES AND HONORS:

- Chairman of the Board of Directors of the State Bar of Texas, 1975-76.
- Chairman - Litigation Section, State Bar of Texas, 1978-80
- The 1993 recipient of the Sam Emison Award given by the Texas Academy of Family Specialists to a lawyer for outstanding efforts in family law and professional service.
- Planned and chaired the first ABA Family Law Advanced Trial Advocacy Institute, University of Denver College of Law relocated to the University of Houston, from 1987 through 1993.
- Council member ABA Family Law Section, 1988-91; and State Bar Family Law Council , 1982-84.

. Member, ProBono Special Disciplinary Council, 1994 to date.

- Founder Houston Family Law Inn of Court, 1995.
- Has delivered over 100 lectures on family law and general civil trial practice matters at national seminars and institutes, across the nation, including Houston, Dallas, Ft. Worth, Austin, , San Antonio, Corpus Christi, El Paso, Atlanta, Kansas City, New Orleans, Phoenix, New York City, Seattle, Chicago, Vail, Denver, Washington, D.C., Tampa, Los Angeles, San Francisco, Tucson, Reno, Las Vegas; Toronto, Canada, and Maui, Hawaii,

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BY: DONN C. FULLENWEIDER

"You have a job to do, and so do it. Yours is to sell socks and suspenders. Mine is to cross examine people like you and crush them." - Alan Shore

As Alan Shore on ABC's *Boston Legal*, James Spader uses sarcasm, wit and a tremendous physical presence to intimidate the witness on cross examination. After a tirade of crafty questions, individuals on the stand are made to look foolish and dishonest. This television illustration of "what it's like to testify" can serve to instill fear in your client when they envision themselves being *crushed* on the stand. As lawyers, it should be our goal to alleviate this anxiety by properly preparing the client to testify.

I. THE CLIENT AS WITNESS

Just as each case has a different set of facts, each client has a different set of strengths and weaknesses in their role as witness. The first step in preparing the client to testify is to take stock of not only his or her case, but also his or her strong and weak points with regard to their ability to give testimony and appear credible.

The lawyer should have a keen awareness of how competent the client will be to answer questions after interacting with the client and practicing their testimony. Strengths and weaknesses should be identified, documented and communicated to the client. The client should not be kept in a vacuum. Giving the client both positive reinforcement and constructive criticism while preparing for their testimony will pay off when the big moment arrives.

II. IMPORTANCE OF PREPARING THE CLIENT TO TESTIFY

Some describe witness preparation as "the most important aspect of trial advocacy."[1]

Yet, the task of witness preparation presents one of the most difficult ethical dilemmas regularly encountered by lawyers. It is permeated by ethical uncertainty.[2]

When a lawyer discusses the case with a witness, the lawyer must not try to bend the witness' story, or put words in the witness' mouth.[3]

What steps must a lawyer take before preparing the client to testify? I suggest it is important for a lawyer to:

1. Understand the issues;
2. Identify the leading legal cases and how they play a role in current case;
3. Identify and organize the key documents relating to the case;
4. Begin a chronology of key events;
5. Develop a theme for the case; and
6. Have some understanding for how the client affects others.

There are three distinct parts to preparing your client to be a witness:

1. Dealing with the clients' anxiety;
2. Helping the client with the relevant facts; and
3. Coaching the client on the techniques of testifying.

III. DEALING WITH THE CLIENTS' ANXIETY.

Successful courtroom consultants can describe many instances of lawyers producing more fear than relieving it. Testifying at deposition or trial is not a pleasant experience and anticipating the experience can even be more unpleasant.

Reduction of anxiety begins with having the client establish confidence in you and in the preparation process. The client must also trust in the ultimate goal of the case and the testimony to be given. This begins with building repore. We must overcome the client's belief that we as lawyers find courtrooms and deposition rooms comfortable places and that we really do not understand their fears. So, our first goal is to make sure the client understands we can appreciate their fear, or in some cases, anger, which is a mask for fear.

You may be amazed if you haven't tried this, but simply repeating the client's anxiety statements is a great reinforcement and repore building technique. For example, when a client says, "[I] feel pain when I recall the events of that evening", you can reply with an affirmative nod, "[I] understand, you feel pain when you recall that evening?" Try it. You will often get an amazing empathetic response. Of course, you must be empathic with the client or it won't work.

Another effective technique is called feel, felt and found. It goes something like this:

- I know how you feel about testifying.
- I felt the same way the first time I had to testify in court.

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[1] Anon. C. J. Rosner, "How to Prepare a Witness for Trial", 82 (1985).

[2] Applegate, 68 Tex. Law Review, 277, 280 (1989).

[3] Wydick Cardozo Law Review, Sept., 1995.

- I found that organizing the events chronologically on paper helped me recall and it filled in some things I had completely forgotten.

It made testifying much easier and others who try it say it works for them.

Anxiety prevents the client from focusing on things that the client needs to remember. A person who is thinking about embarrassing questions he might be asked, instead of concentrating on what was being asked, will make mistakes, because it is distracting. Anxiety interferes with the client's ability to understand and remember what we are telling them. If we are going to serve the purpose of relieving anxiety, we must first listen to the client's nervousness and worries about what is going to happen.

No matter how much time we spend in going over the facts and coaching our clients on the techniques of testifying, an anxious, nervous client will not give a good impression. Although he may be perfectly truthful, he may not be believed.

A lawyer must keep in mind, a client prepared on the substance of his testimony, will not present clear and persuasive testimony unless he remains calm enough to understand the questions and to respond appropriately and cautiously. His demeanor must demonstrate confidence in the truth of his testimony. This primary goal in the initial preparation should be to take the burden off of the client's shoulders so that he can focus only on the substance of his answers.[4]

The three parts to client's witness preparation for a deposition or trial should be separate and distinct events, with the final session well in advance of the day of testimony.

Having two or more separate sessions allows you to do follow-up investigation that may prove necessary before the deposition or trial.

Each of us has our own repore building technique, which will help us put our clients at ease. A good beginning point might be explaining the logistics of the deposition such as when, where and who will be there, and the rules of decorum. Explain how, during a deposition you will be sitting next to the client the entire time. Reassuring the client that a deposition can be corrected in writing if there are mistakes may take some of the pressure off of the client.

I often tell clients that a deposition is not a "test" in which they need to know the "right" answer. Often people feel, at least subconsciously, that being questioned in deposition is similar to being tested in school. This adds to their fear. When I tell them that this is not a test I often hear "but I'll be expected to know . . . " and "What if I can't remember?" "What if I don't know the answer?" The best reply is to let them know they are not expected to know all of the answers, and that you will go over the important issues so they will have an idea as to what kind of questions they will be asked. Remind them if they do not know, or do not recall, it is okay to say so. Tell them a person might guess on a test and get the right answer and a higher, but never guess on the witness stand. A bad guess is worse than a"0" . The ethics professors also warn that general advice though useful in insuring a relaxed witness who will testify clearly and who will not be distracted or flustered by a cross-examination is relatively innocuous, yet in some situations calming a client tends to induce an unwarranted degree of certainty in the their testimony.

"Such preparation may unwittingly turn a skeptical witness into a true believer. For example, in response to a lawyer's advice to speak clearly and confidently, a witness might deliberately change an uncertain recognition of a suspect to definite recognition of the suspect. This change is perjury. But when, as is more likely, the changed testimony is not deliberately wrong but rather the result of suggestion, the "true believer" is less obviously, and certainly less provably, a perjurer."[5]

Once you have done your best to reduce the client's witness anxiety, you can move on to cover the facts of the case.

IV. HELPING THE CLIENT WITH RELEVANT FACTS.

This is the area where the lawyer's own preparation becomes important. To help the client be a successful witness, the lawyer must know the issues and what will be relevant at trial in order to anticipate what the client will be asked. The initial interview with the client will give clues about the ability of the client to recall and reduce the likelihood of confusion. Yet, people do forget and their memories are not perfect. How do you make the client's witness preparation stick? There are five important rules to help the client do his best on relating the facts: [12]

A. Interact;
B. Confirm;
C. Repeat;
D. Illustrate; and
E. Re-enforce

[4] Malone & Hoffman, "The Effective Deposition," NITA Practical Guide Series, p. 155, 2nd Edition.

[5] Applegate, at 299

A. Interact.

Remember, strictly lecturing the client for an hour is boring and their attention span will drift. Make the client's witness preparation session a discussion. Ask questions and then listen.

B. Confirm.

Constantly check with your client to make sure that what is being said is being understood. Use the client's own words in repeating what they have told you.

C. Repeat.

Replaying it several times will make it more likely that the information will be remembered. Give instructions more than once but phrase the information differently.

D. Illustrate.

Give examples of key points and the kinds of questions and answers which illustrate the problem that might arise. Have a check list or example questions and answers from your prior trials or from trial technique texts.

E. Re-Enforce.

Have the client practice following the instructions given. Re-enforcement will help impress the instructions upon the client. Avoid simply reminding the witness when they violate the instructions. Practice by having the client answer the questions in the correct manner. The following technique depends on your personality. I have never tried it, but some litigators recommend that each time the client slips up and begins to talk too much, slam your hand down on the desk. Once the actual deposition, or trial testimony begins, the client will be gun-shy, hearing the echo of the irate attorney's fist as it slams into the desk. It really works, according to David Berg.[6] But, it is not my style.

F. The Ethical Rules.

When we consider coaching a witness about the facts for testimony, the ethical rules regarding the lawyer's role becomes important. What kind of coaching is appropriate and what is not. The ethical rule in Texas covering this is Rule 3.04, which provides:

"A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, . . . "

Ethical Consideration 7-26 codified an answer to what has to be one of the most difficult moral issues facts by any profession:

> *The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.*[7]

In Great Britain, Barristers may not "practice, or coach a witness in relation to his evidence, or the way in which he should give it."[8] Part of the rule has its genesis in the distinction between the role of the Solicitor and the Barrister, yet the notion of a lawyer contaminating a witness is embedded in the English system. In the civil law system, where the courts take an investigative role, similar prohibitions against talking with witnesses are observed by lawyers. For example, in Germany it is commonly accepted that a witness who has talked with a lawyer before giving testimony will not be believed by the tribunal.[9] Our system is much more permissive, but it is clear that only certain kinds of witness coaching is permitted.

G. Helping Memory.

There is much psychological literature reporting on scientific experiments concerning human memory. In the 1970's psychologists from the University of Washington performed experiments in which people saw an event and were later exposed to new, misleading information about it. When they were later asked what they had seen, they were frequently wrong, reporting the new misleading information, instead of what they had seen. These researchers proposed a theory that the new misleading information "overrides or destroys the original memories with which it conflicts."[10] In the early 1990's that was challenged by other researchers who suggested that the new, misleading information does not destroy original memory, but just makes it harder to retrieve.

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[6] David Berg, "Preparing Witnesses", Litigation, Winter 1987, Vol. 13; No.2.

[7] T.R.C.P. 199 - 203

[8] Code of Conduct of the Bar of England in Wales, 607 (b) (1995).

[9] Wydick, "The Ethics of Witness Coaching, *Cardozo Law Review*, September 1995.

[10] Wydick, at p.10

Later, a different research team made a more serious attack. They argued that the theory is based on flawed testing procedures and that the new misleading information does not impair the original memory, or the ability to retrieve it. Using different testing procedures, they concluded that the new misleading information effects the reports of only those subjects who failed to notice the original detail, or who had noticed but forgotten it by the time they were exposed to misleading information. Since 1985, further experiments have countless times confirmed the basic phenomenon:

> *All of the researchers in the field agree that (whatever cause and mechanics) the accuracy of a person's story about an event can be severely compromised by exposing the person to new, misleading information.*[11]

Further work in the field provides strong evidence that at least some of the misled persons sincerely believed that they saw things that, in reality, were only suggested to them. Important and well recognized psychologists have concluded that it is, "now well established that the accuracy of eyewitness testimony can be severely compromised by exposure to misleading, post event suggestion" and "that whether or not exposure to suggestion impairs the original memory, the fact remains that subjects can be easily led to report misinformation that has been suggested to them."[12]

Of note also is the fact that small differences in the wording of questions can make large differences in the witness' response. A well known psychological study examined the impact of the use of two articles "A" and "The". If the witness is asked, "Did you see the thin man in the blue suit?" He will be more likely to answer affirmatively than if he had been asked, "Did you see a thin man in a blue suit?" One explanation is that the use of "the" tips off the witness that the questioner thinks that such a; man was present, whereas the use of "a" keeps the questioner in a more neutral position.

In another study of wording differences, two equivalent groups of people were asked about headaches. One group was asked, "Do you get headaches frequently, and, if so, how often?" That group reported an average of 2.2 headaches per week. The second group was asked, "Do you get headaches occasionally, and, if so, how often?" That group reported an average of 0.7 headaches per week.[13]

Experiments of this sort suggest that we should use care in wording interview questions and should, where possible, use neutral words instead of words that reveal any beliefs, value judgments, attitudes, desires or expectations. The obvious danger disclosed by all of this psychological information is that in preparing our witnesses, if we induce, directly or indirectly, our version of the facts we might prevent the witness from recall the actual events. In other words, the truth.

H. The Cognitive Interview.

It has been suggested by Professor Wydick that if a lawyer really wants to learn how to coach less and learn more from witnesses, he should consider using a more comprehensive approach developed by psychologists to develop information and help a witness recall. That has been referred to by Edward Geiselman also. Ronald Fisher and their colleagues reported by Richard Wydick in his work as the cognitive interview.[14] This interview technique has been tested by researchers and been found that in contrast to more conventional interviewing techniques, the original cognitive interview increases the witness' output of correct information by an average of 25-30%.

The original reported cognitive interview had four memory enhancing techniques:

1. Technique One - Restate context. The witness is asked first, try to restate in his mind the context surrounding the incident. Statements like "Think about what the room looked like and where you were sitting in the room." and "Think about how you were feeling at the time and think about your reaction to the incident."

2. Technique Two - Tell Everything. The witness is urged to lower their standard for relevance and report every scrap they can remember, even if it seems incomplete or irrelevant. The hope is that the incomplete or irrelevant scrapes might clue other material that could prove useful.

3. Technique Three is based on the well known cognitive psychology theory that there may be several retrieval paths to a particular piece of information and when one retrieval clue does not work, a different one may. The witness is instructed to go through the incident from beginning to end, however, they found that many people can come up with more information if they can put the events in reverse order. You might want to start with the thing that impressed you the most, and then go from there proceeding both forward and backward in time.

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[11] *Id.*

[12] Wydick, "The Ethics of Witness Coaching, *Cardozo Law Review*, September 1995.

[13] *Id.*

[14] *Id.*

4. Technique Four - How others may have seen the event. This likewise seeks to open a variety of retrieval paths. The witness is asked to try to adopt a perspective of others who were present during the incident. For example, try to place yourself in "X's" role and think about what she must have seen.

These helpful techniques to help memory can be used through the stages of the interview. Suggested are the following five stages:

1. The Introductory Stage. First seek to put the witness at ease and, secondly, the interviewer should first build repore with the witness and explain the witness' central role in the interview. The witness should do most of the talking and hard thinking. The interviewer should do mostly listening and gently guiding and probing when necessary. Finally, the interviewer should explain to the witness the four basic memory enhancing techniques and encourage their use in the interview.

2. Open Ended Narration. The interviewer asks the witness one or more broad, open ended questions that are designed to elicit from the witness a narrative about the events, such as, "Tell me in your own words whatever you can remember about the meeting", or "Tell me everything you can, in as much detail as you can."

3. The Probing Stage. The interviewer directs the witness' recollection back to each significant topic the witness mentioned in the open ended narration, patiently taking each topic separately and exhausting the witness' memory about that topic before moving on to the next. The interviewer should begin each topic with an open ended question that asked the witness to give a detailed narrative of everything the witness can remember about it.

4. In the Closing Stage, the interviewer should urge the witness to get in touch when she remembers anything else about the event.

The single, most important skill an interviewer can learn is not to interrupt the witness in the middle of a narrative response. When the witness says something worth pursuing, the interviewer should make a note of it and come back to the subject later. Even if the witness pauses for several moments during the narrative, the interviewer should keep quite, or perhaps use a gesture to encourage the witness to continue.

After this type of interview, it is important to help the client understand that much of this is exactly what the he or she does not do when testifying at trial or at deposition.

Other steps that may help witnesses with the facts and one I personally find most helpful in my preparation is organizing the facts in some chronological order. Have the client create his or her own calendar of events to put events in context gives the client self confidence. It is not a good idea to allow them to take such notes with them to the stand which will expose the list for the cross examiner.

To help with fact preparation, the client should be told to read if available:

a. any of their prior testimony;
b. the pleadings;
c. interrogatory and disclosure answers;
d. relevant deposition of others in the case; and
e. the key documents in the case.

Some lawyers still insist on demonstrating dominance during the interview. This can be a big mistake because the client is the one holding all of the memories. Successful trial lawyers know from experience not psychological testing, that real memories hold up under cross examination, implanted and contrived memories most often do not.

V. COACHING THE CLIENT ON THE TECHNIQUES OF TESTIFYING.

Here is when you may wish to use a check list technique on how to be a good witness and follow-up with a letter or check list for the client. The Family Law Section Checklist is a good example. Videos such as sold by the State Bar of Wisconsin may be useful.

A. Impressions.

You might begin by explaining that what they say is frequently less important than how they say it. To be perceived as credible and honest at trial, a witness must exhibit appropriate attitudes and supportive body language and tone of voice.[15] Dr. Albert Mehnabian's book "Silent Messages" concluded that communication is 55% visual (how you look and act); 38% vocal (your voice and diction); and 7% verbal (what you actually say).[16]

The key concepts of persuasion were used by the ancient Greek orators. Aristotle analyzed these methods, and broke them into elements which he called *ethos, logos* and *pathos*. His works describe these in detail, but for our purposes they can be helpful in a shorthand rendition. *Ethos* means substance or worth, it means good character or believability. I recall this being explained to me as the power of the speaker. We will believe and want to follow a person who has good

[15] Elaine Lewis, "The Not-So-Secret Secrets of Good Witnesses", *Family Advocate,* Fall 1998, at 24.

[16] *Id.*

standing, a person who is, or appears to be worthy of being believed. *Logos* is a logical argument, or in the case of testimony, clear, organized and relevant factual information. P*athos* is a compelling emotional impression.

Aristotle believed that each of these characteristics is individually desirable, but a combination of the three produces the most persuasive orator, or, in our case, witness.[17] Perhaps *pathos* is the most important of the three qualities.

Advertising campaigns rely on *Pathos.* It is the great background in music and television. It is the emotional words in the 10 second sound bite. Why? Because we respond positively to emotional appeals.[18]

Teach your witness *pathos* by encouraging the expression of personal feelings and emotions during direct testimony. Perhaps, in cross examination, look for words to describe the feelings of the witness during an event such as fear, happiness, excitement, anger, or surprise. Witnesses can be stiff as cardboard if they believe that formality is the expected demeanor in court.[19]

Unless the witness is a public figure or looks like Charlton Heston, as Moses coming down from the mountain, their appearance will not have much to do with their credibility. They will have to develop *ethos* by their appearance.

Remind them that their decorum will be monitored by the judge and jury in the courtroom and during recess and that a trial must be conducted in a sober atmosphere if they want to create the right impression. Tell him to get a haircut, or her to get her hair done, and if you want, dictate the style. Tell them not to tranquilize, speed up, or otherwise use drugs to help themselves during trial.[20] Talk about any medications they have been prescribed to take and learn how its use, or lack of use, will effect their delivery, memory and appearance. Their dress and body language will be watched for credibility.

A person with powerful *ethos* is straight forward, not evasive, does not argue, is not sarcastic, defensive, is deferential, modest and cooperative.

Elaine Lewis, a non-lawyer consultant from New York who prepares witnesses to testify, tells us a good witness:

- makes eye contact with whomever he or she is speaking – a questioner, a lawyer, or the judge;
- sits upright and maintains an open posture; and
- speaks in a consistently strong voice.[21]

Obviously, one does not simply tell a witness these things, but through observation, and going over what is weak, by discussing and explaining how each of the above and other items on the check list will help with their credibility.

Logos is best explained by how a witness responds to the questions. Here the key direction of every witness in every preparation is listen to the question, understand the question and just answer <u>that</u> question.

B. Listening to the Question.

1. In order to get this concept across, I often tell a client to "listen to the question, then pause before you answer and repeat in your mind the question. Then, yourself ask 'do I understand the question', then answer." A witness who interrupts the question and starts to answer before the attorney finished framing the question, is simply not listening to the question. Remind the client, a deposition is not a conversation. I repeat, over and over, for the client to listen to the question very carefully, analyze and replay it in their mind before answering the question.

2. If the client has listened to the question and analyzed it, then he will know how to answer it. The next points are:

a. Always answer the question that the attorney asked and not some other question;
b. Do not help the opposing attorney do his job; and
c. Remember, a deposition is not an exchange of ideas. The opposing lawyer is going to try to confuse the client, or extract answers from the client which will help his or her own client.

C. Guessing or Speculation.

It is often difficult for the witness to admit he doesn't know, but if that is the truth, by all means he must say so. A good explanation to give is, if five different, highly intelligent persons attempt to speculate about a subject matter about which they have no first hand knowledge, they will use five different, highly intelligent sets of assumptions. When all is said and done, they will all disagree with one another on some important details and it will appear that they are lying.

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[17] Elaine Lewis, "The Not-So-Secret Secrets of Good Witnesses", *Family Advocate*, Fall 1998, at 24 - 25.

[18] Lewis, at p.24-25.

[19] *Id.*

[20] David Berg, "Preparing Witnesses", *Litigation*, Winter 1987, Vol. 13; No. 2, pg. 14

[21] Elaine Lewis, "The Not-So-Secret Secrets of Good Witnesses", *Family Advocate*, Fall 1998, at 24 - 25.

D. Do Not Argue with Counsel.

The client needs to be reminded not to argue with counsel. I tell the client to forget trying to win the case during the deposition. Forget trying to explain to the opposing lawyer why his legal and factual arguments are wrong. Do not try to use a deposition as a forum to convince anyone that you are right, and that the other side is all wrong. If the client has carefully prepared and knows the facts, the facts will speak for themselves. Efforts to try to win arguments during depositions almost always help opposing counsel to ask better questions – better for her client, that is.

E. Do Not be Indefinite, But Avoid Absolutes.

Instruct the client that they must avoid the attitude that "anything is possible", or that "it might have happened that way." There is a major difference between a failure to have total and accurate recall about an event or conversation, and simply deciding that, because they do not have a perfect memory, it could have happened the way the opposing lawyer says it happened. If the client does not think that a conversation happened a certain way, he needs to say so.

A client need not agree with the proposition that something "is possible" without clarifying his position. An example might be given as, "Well I suppose that anything is possible, but I really do not believe that it happened that way." Similarly, there is a big difference between "I don't know" and "I don't know for sure, but I really don't think that anything like that occurred."

I try to warn clients to beware of absolutes. It is better to say that "I do not recall that" than "I did not say that." Similarly, it is often better to say "I don't recall that" instead of "that didn't happen." I also explain for the client to watch for questions that use the words "always" or "never". These questions are designed to box-in the witness and may prevent him from explaining an answer.

F. Ambiguous Questions.

The client must be warned about ambiguous questions. By design, or mistake, many questions are susceptible to two or meanings. The client needs to be cautioned that he may think the question means one thing, and so he answers "yes" on the record. Then, when the client's testimony is presented at the hearing, the attorney will argue that his question meant something else. He will assert that the client agreed with a different proposition than what the client originally thought was presented by the question. Tell your client to listen to the question carefully, repeat is in his mind and think about it before answering it. Through this process he or she should pick up any ambiguities.

G. Exhibits.

The client must be advised how to deal with exhibits if handed certain documents. Make sure the client reads the document carefully. Warn him to do this even if he has seen the document recently and is familiar with it. Explain that if the lawyer asks the client whether he can "identify" the document, he or she is merely asking whether the client can state what the document is. Sometimes you can do that even if you have never seen the document before. Tell the client not to leave the impression that he saw the document before if, in fact, he did not. The client can reply, "Well, I'm not sure that I have seen this before, but it looks like a memorandum dated January 25 from Pat to Mike."

Even if a witness may have not seen a document before, he may be questioned about it particularly during a deposition and often at trial if it falls into a sheave of documents with which the witness should be familiar. Therefore, caution must be warned lest the witness casually shrug off some important piece of evidence just because he doesn't recall, or never saw it. The Microsoft anti-trust case with thousands of e-mails is a case in point

Group preparation can be helpful in informing witnesses of the context into which their testimony fits. Some ethics teachers believe this to be highly questionable (See, Applegate, 68 Tex. Law Review, 277, 280 (1989).) Group preparation helps in developing the facts and uniformity. Each can see the case as a whole. Errors in perception, faulty observations and bad judgment can be seen more clearly. Group perception sharpens and refreshes recollection and eliminates the dangers of witnesses needlessly contradicting each other. My experience with juries is that they become suspicious of group perception and say so. I'm sure judges feel the same way.

Now is the time to leave the client with a check list of things to remember and points to watch for during cross. Reinformed with videos of other depositions and copies of redacted depositions from other cases will bring clients confidence. If time and money permit, dry runs of cross examination with video cameras, followed by a candid and gentle critique can also be used.

Many cases do not justify the time you may take to follow all of the suggestions in this paper. Yet, you must make a risk assessment for the client. At some point there is an absolute minimum of preparation in every case. Where there is a big risk and money to fund it, consider calling in the help of a professional such as Courtroom Intelligence, or Elaine Lewis and others. They often charge less per hour than many lawyers and most often do a better job. Usually the more time spent in witness preparation the better the result after the witness takes the oath.

APPENDIX A

LAWYER CHECK LIST FOR PREPARING YOUR CLIENT TO BE A WITNESS:

Adapted from Elaine Lewis' "The Not-So-Secret Secrets of Good Witnesses", Family Advocate, Fall 98, Page 25.

A GOOD WITNESS TO BE PERCEIVED AS CREDIBLE AND HONEST AT TRIAL:

- listens to the questions asked, understands the question and responds only to that question;
- exhibits appropriate *attitudes* and supportive *body language* and *tone of voice*;
- is well versed in the facts of the case;
- understands the theory of the case and puts the facts in focus during direct examination;
- testifies consistently on cross with the facts presented during direct and in depositions and prior sworn statements;
- is familiar with all the information about which he or she expects to be questioned (including the general contents of exhibits, depositions, transcripts and stipulations);
- is not evasive in responses to questions;
- does not dodge issues;
- is willing to take "hits" when it is clear that he or she did something wrong;
- appears helpful on cross-examination – giving a sense of wanting to solve a problem in a positive manner;
- does not argue;
- is not sarcastic;
- is not defensive;
- is deferential rather than arrogant;
- is modest;
- is cooperative;
- does not get angry with opposing counsel;
- makes eye contract with whomever he or she is speaking – a questioner, a lawyer, or the judge;
- does not use facial expressions that detract from what is being said;
- is free of distracting mannerisms;
- sits upright and maintains an open posture;
- speaks in a consistently strong voice;
- does not allow tone to show inappropriate attitude. Tone conveys nonverbal attitude;
- is willing to be vulnerable and show feelings; and
- relates the case with details and examples that touch a listener.

APPENDIX B

Guidelines for Witness Interviewing based on the Principal of the "Cognitive Interviewing" by Richard Wydick.

Four Stages of Witness Interviewing:

1. The Introductory Stage. First seek to put the witness at ease and, secondly, the interviewer should first build repore with the witness and explain the witness' central role in the interview. The witness should do most of the talking and hard thinking. The interviewer should do mostly listening and gently guiding and probing when necessary. Finally, the interviewer should explain to the witness the four basic memory enhancing techniques and encourage their use in the interview.

2. Open Ended Narration. The interviewer asks the witness one or more broad, open ended questions that are designed to elicit from the witness a narrative about the events, such as, "Tell me in your own words whatever you can remember about the meeting", or "Tell me everything you can, in as much detail as you can."

3. The Probing Stage. The interviewer directs the witness' recollection back to each significant topic the witness mentioned in the open ended narration, patiently taking each topic separately and exhausting the witness' memory about that topic before moving on to the next. The interviewer should begin each topic with an open ended question that asked the witness to give a detailed narrative of everything the witness can remember about it.

4. In the Closing Stage, the interviewer should urge the witness to get in touch when she remembers anything else about the event.

Four Techniques for Helping Witnesses to Remember:

1. Technique One - Restate context. The witness is asked first, try to restate in his mind the context surrounding the incident. Statements like "Think about what the room looked like and where you were sitting in the room." and "Think about how you were feeling at the time and think about your reaction to the incident."

2. Technique Two - Tell Everything. The witness is urged to lower their standard for relevance and report every scrap they can remember, even if it seems incomplete or irrelevant. The hope is that the incomplete or irrelevant scrapes might clue other material that could prove useful.

3. Technique Three is based on the well known cognitive psychology theory that there may be several retrieval paths to a particular piece of information and when one retrieval clue does not work, a different one may. The witness is instructed to go through the incident from beginning to end, however, they found that many people can come up with more information if they can put the events in reverse order. You might want to start with the thing that impressed you the most, and then go from there proceeding both forward and backward in time.

4. Technique Four - How others may have seen the event. This likewise seeks to open a variety of retrieval paths. The witness is asked to try to adopt a perspective of others who were present during the incident. For example, try to place yourself in "X's" role and think about what she must have seen.

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