

Introduction

Answers matter. They have consequences, big ones. It takes only one bad answer to lose a case and a whole bunch of good ones to win it.

Answers decide whether money changes hands. They decide who controls the board, whether the insurance company covers the loss, whether the product can use the trademark, whether the company stays in business, whether someone goes to jail, whether the husband gets custody, whether the manufacturer pays damages for personal injury, whether employees recover back pay and money for emotional distress, or even whether someone is executed. The answers either keep you up at night or let you sleep. They are the bed you lie in or the grave you die in. The answers are everything.

If you're a lawyer, you prepare clients to give depositions and to answer questions from opposing counsel at trial. How you prepare your clients will make the difference in how they answer them, and how they answer them is critical to whether they win or lose.

If you're an expert witness, you testify for a living. You get paid lots of money to answer questions, and if the answers come out wrong, all the faith your clients and their legal team placed in your expertise will count for nothing. Your testimony will sink the case.

If you're a party in a lawsuit, you might never have testified before but soon you'll be questioned by someone who wants to build a case against you and who has much more experience at this than you do. What can possibly go wrong?

Good lawyers never let their clients face questions from an opposing attorney without first preparing them. Too much rides on the outcome. The opposing attorney is presumably skilled in the craft and knows how to structure questions to produce the worst result for the luckless witness. The opposing attorney knows that if the answer is A, the next question is X, but if the answer is B, the next question is Y. The opposing attorney has a goal and a way of getting there.

What does the witness have? The witness has the words and guidance from the preparation. The advice better be great and the preparation fabulous because if it's bad advice and the witness follows it, the answer will be a self-inflicted wound and the result will not be pretty.

Witnesses may be interested to know two things about how lawyers routinely prepare their clients to answer questions from opposing counsel. The first is that lawyers have been doing it the same way for generations. This is not a surprise. Lawyers learn from their mentors. The mentors learned from their mentors. It's the conventional wisdom. No one bothers to question why the mentors developed these witness-preparation techniques. Someone else has already thought it through and worked out the bugs. The present generation need only learn and apply what their predecessors have been doing for such a long time. Knowing that your lawyer is preparing you in the same way that lawyers have been preparing clients forever should be very comforting.

Except for the second thing: In most cases, the way lawyers have been routinely preparing clients to testify is not only wrong but can be dangerous. These witness-preparation practices have been around for so long that they have taken on a gospel-like quality. But on close examination, they are not up to the task. They are based on false assumptions about how people process language, about the capabilities of witnesses to provide helpful answers, and about the opportunities the civil and criminal justice systems offer for development of the truth.

This is not to say that the adversarial system is poorly designed to ferret out fact from fiction. Far from it. When it works correctly, people get to tell their stories, opposing lawyers get to test those stories through cross-examination, judges keep out evidence that juries are not supposed to hear, and the trier of fact will decide what really happened.

But the system does not always work that way. Answers can be poorly expressed or come out the wrong way. Witnesses can fail to connect with fact finders. Important information and explanations can go unsaid. Those who lose will often believe that the system produced the wrong result, that truth and justice did not prevail. Could it be that maybe they simply did not understand the system well enough and failed to adjust for its imperfections?

For example, many lawyers mistakenly believe that if their clients give a poor answer to an opponent's question, the system will offer an effective opportunity later to correct it. It will not. It will offer an opportunity but not a very effective one. Many lawyers do not understand this. They prepare their clients to take blows from opposing counsel, believing that if their

clients get injured, the injury can be repaired after the fact. The aim, however, should be to avoid the injury in the first place.

Boxing and judo offer rough analogies. Many see a deposition or cross-examination as a boxing match between the opposing attorney, an experienced fighter, and the witness, a novice. Given the asymmetry in experience, the lawyer's advice to the witness is generally defensive: *Say as little as possible. Don't try to win your case when the other side is asking you questions; just don't lose it. When the other side is done, I'll come in and ask you questions to bring out anything else I think you need to say and to correct any mistakes you might have made.*

In boxing, this would be the equivalent of saying, "I know I'm sending you into the ring with an experienced fighter and you don't know how to box. Therefore, don't try to throw punches or knock out your opponent. Just hold your arms and gloves in front of your face and upper body and try not to let any punches land on your face. The aim is to be standing when the last round ends. If you get hurt, I'll put some ointment and Band-Aids on your cuts and scratches and maybe we'll need to send you to the hospital to treat the concussion and broken ribs, but don't worry. In the next bout, I'll be the experienced fighter and take my turn with the party on the other side."

This strategy won't work well in the litigation arena. If a lawyer counsels a client to treat a deposition and cross-examination as if the client were an undertrained boxer, and if the lawyer does not give the client confidence to respond in a more effective way, it should surprise no one if the client gets hurt, as we'll see later.

Clients would be better served if lawyers thought of a deposition or cross-examination as akin to judo, a martial art designed to enable a weaker opponent to overcome a stronger opponent by adjusting to the opponent's attack, causing the opponent to lose balance and power and ultimately leading to the opponent's defeat. In judo, skill and technique are more important than strength. In depositions and cross-examination, the weaker opponent is the witness. The witness's lawyer should be teaching the witness how to harness skills and techniques that he already knows and employ them to gain the advantage.

The point of these analogies is not that witnesses should be combative. A combative witness is often a poor one. The point is that lawyers need to approach witness preparation in a new way, moving away from the model where witnesses, when questioned by the opposing lawyer, are taught to clam up and yield as little information as possible. Lawyers need to move toward a model that gives witnesses the skill, confidence, and frame of

mind to answer the questions in ways that will help their cases, develop their case themes, and get their stories out.

Conventional witness-preparation techniques do not do this. Instead, they teach clients to keep their answers short, not to volunteer information, and not to answer ambiguously worded questions. These instructions sound like rules of thumb masquerading as advice and strategy, but they are poor ones, more often harmful than helpful.

This form of preparation, a staple in the litigator's toolbox, is rooted in the fear that if clients answered as they would in ordinary conversation, they would needlessly educate the opponent, say something stupid, create impeachment opportunities, and hurt the case.

The classic solution is to condition clients to say as little as possible and teach them ways to do that: *Make the lawyer on the side work for every answer; the less said the better. The time to win your case is when your own lawyer asks you the questions; that's when you should open up and tell your story.*

Although this is the conventional wisdom, it's pretty strange. Good lawyers understand the importance of advancing case themes at every opportunity, from the opening pleadings to every motion, every brief, every oral argument, every question asked, every piece of evidence offered. Good lawyers are constantly moving the ball closer to the goal line and ultimately positioning themselves to score—except, surprisingly, when it comes to the client's deposition and cross-examination.

When a client is deposed or cross-examined, lawyers who follow conventional witness-preparation models relinquish those case-building moments to their opponents. These models allow clients to stop advancing their own themes and let opposing counsel advance theirs. The opponents ask the questions they want and often can count on the witness to answer *yes, no, I don't know, I don't understand, or I don't remember*, knowing that witnesses have been advised not to stray beyond those supposedly safe answers or to say things that would advance their own case. The opponent can look forward to the witnesses giving abbreviated answers, divorced from context, suitable for cutting and pasting into the opposing party's narrative. The witnesses are sitting ducks, and the witness-preparation instructions—the ones lawyers learned from their predecessors—serve to harm, not help, the witness. Instead of arming clients with the skills and confidence to give truly responsive answers that help their cases, lawyers instruct them to fear every question and give shorthand answers. But those shorthand answers can go a long way to helping the other side.

If you're a litigator and don't believe this, you need to read this book. If you think there's some truth to this but don't know or are not quite sure how to prepare witnesses any differently, you need to read this book.

If you testify for a living, say as an expert witness, a law enforcement officer, or a corporate representative, and have been following conventional wisdom on how to respond to the other lawyer's questions, you need to read this book. If you will soon need to testify in a case that's important to you, your family, or your employer, you need to read this book.

If you are ever called upon to answer an important question, where the answer will have consequences, you need to read this book.

If you think you know it all and do not need to read this book, you need to read this book.

This book explains the dangers of conventional witness preparation, showing how the common approach to preparing witnesses can foul up a case. It explains how the standard instructions can be quite dangerous and, if followed religiously, can hand victory to the other side.

This book explains the driving philosophy behind a new and enlightened approach to witness preparation: that witnesses need to give answers that actually help their cases, and the best time to give the best answer is when the question is first asked, whether on direct, on cross, or in deposition. If the witness needs to give explanations or corrections after the deposition or cross-examination is over, then in all likelihood the witness has already been injured, an injury avoidable with the approach this book teaches. As you will see, an important goal of effective witness preparation is to make redirect and rehabilitation unnecessary or at least to reduce significantly a lawyer's need to rely on those remedial techniques.

Contrary to conventional witness preparation, this enlightened approach does not shy away from ambiguous questions or from volunteering information. It teaches when and how to answer ambiguous questions or to provide information that goes beyond the scope of the question. It teaches how to prepare clients to give well-informed answers that not only respond to the questions but advance the theme of the case, while avoiding the pitfalls that conventional approaches fail to prevent.

Most fundamentally, however, this book relies on the virtues of communication skills and techniques that most witnesses already know. It teaches how to apply them when testifying so that the judge, jury, or even the news reporter who is monitoring the testimony for a curious public understands the testimony as the witness meant it to be understood. It teaches how these skills can enable the witness to reclaim ownership and control over

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the testimony and defeat opposing counsel's attempts to wrest the story from the witness and put words in the witness's mouth. It teaches how to empower the witness to tell the truth as she best understands it, rather than how opposing counsel would attempt to portray it. And it teaches how, in the confrontation between witness and opposing counsel, the witness can earn the fact finder's trust, build credibility, and prevail over opposing counsel's best efforts to have that confrontation come out the other way.