

“Lawyers need to empower clients to give responses in proper context and address the obvious point of the question without feeling confined by its literal text.”

The Failures of Conventional Witness Preparation

Q: YOU'VE WRITTEN AND SPOKEN EXTENSIVELY ON HOW CONVENTIONAL WITNESS PREPARATION CAN LEAVE WITNESSES GIVING HORRIBLE TESTIMONY IN DEPOSITIONS AND CROSS-EXAMINATION. WHAT'S THE PROBLEM?

KENNETH R. BERMAN: Lawyers customarily teach their clients that, when opposing counsel is asking the questions, the client shouldn't volunteer information or improve on the question, shouldn't try to answer questions they don't understand, should say they don't recall if they don't have a good memory, and should keep their answers as short as possible because the more they say, the more ammunition they give the other lawyer. Instructions like these frighten witnesses into claiming not to understand questions that everyone else would understand, into giving answers so narrow as to leave misleading impressions, and into believing mistakenly that their memories are so poor that they should answer “I don't recall” even though no one would believe it.

Q: WHAT'S AN EXAMPLE OF A BAD ANSWER THAT MIGHT COME FROM A CONVENTIONALLY PREPARED WITNESS?

KRB: Let's say a woman claims her boss fired her for resisting his advances. The woman's lawyer might ask the boss: “You found my client attractive, isn't that so?” The question is a trap: a “yes” answer would make it plausible that he had made unwelcome advances, while a “no” would be insulting and sound like he fired her because he didn't find her attractive. So the conventionally prepared witness might say “I don't understand the question,” thinking that the word “attractive” is ambiguous enough to justify that answer and thereby duck the question. But a juror would find that answer evasive and unsatisfactory because a juror wouldn't hear the question as being confusing. If a juror would understand the question, the witness becomes untrustworthy and invites credibility trouble by claiming not to understand it.

Q: SO HOW SHOULD THE WITNESS ANSWER IT?

KRB: Using as much courtesy as when the witness responds to his own lawyer, the witness could say: “I'm not exactly sure what you mean, but I didn't find her attractive in the sense I think you're implying.” It's a clear, non-evasive, earnest answer, natural, credible, and helpful to the jury's understanding of the case. And the questioning lawyer gets nothing to use.

Q: WHAT KIND OF ENLIGHTENED PREPARATION WOULD LEAD TO THE BETTER ANSWER?

KRB: Lawyers need to empower clients to give responses in proper context and address the obvious point of the question without feeling confined by its literal text. The goal isn't to provide the least amount of information, but to answer the question truthfully and as fully as circumstances warrant without leaving a misleading impression. Contrary to what the conventional approach teaches, witnesses may well need to improve on the question or volunteer information in order to advance case themes, promote credibility, and help the factfinder see the case from the witness's perspective. There's obviously much more to this approach. It's a paradigm shift. Its successful implementation depends on knowing the witness's testimonial skills. The preparation should be tailored to the witness, as one size does not fit all.

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