

Reinventing Witness Preparation

KENNETH R. BERMAN

The author is a partner at Nutter McClennen & Fish, LLP, Boston.

Surprise! They taught us all wrong. We should be doing it so differently.

We've prepared witnesses for deposition and cross-examination so many times, we can do it in our sleep. *Listen carefully to the question. Don't try to answer a question you don't understand.*

We've seen it in the training videos. *Answer only the question that's asked, not the question you think they meant to ask. Don't try to improve on the question.*

We've heard it at CLEs and learned it in trial practice classes. *Above all, don't volunteer information. If they ask you whether you were at Grand Central Station on Tuesday, the answer is "No"; not "No, I was there on Wednesday."*

We've watched colleagues do this drill with innumerable clients in countless witness preparation meetings. *If there's even a single word in the question you don't understand or if there's some ambiguity in the question, just say "I don't understand the question." Or say "Can you rephrase the question, please?"*

We've given the familiar warnings. *When the other side is asking you questions, that's not the time to try to win your case. Your job is simply not to lose it. Just answer the question they ask you. If there's other information you think helps your case but the question doesn't call for it, resist the impulse to volunteer it. If I think the information is helpful, I'll get it from you when it's my turn to ask you questions.*

We've trained witnesses about what to do when their memories are impaired or deficient. *It's not a sin if you don't remember something. If that happens, don't try to come up with an answer anyway. Just say "I don't recall." And if you don't know something, just say "I don't know." That's perfectly OK.*

And we've cautioned witnesses about the big differences between testimony and conversations. *Giving testimony is not like having a conversation. In a conversation, you're trying to engage the other person and get the person to be more interested in what you have to say. You say things that help the other person ask you more questions because you want the person to be more interested in you. But when you testify and the lawyer on the other side is asking you the questions, it's just the opposite. Avoid the temptation to turn it into a conversation. Keep your answers as short as possible. Don't elaborate. Just answer the question and stop.*

We litigators have been preparing witnesses like this for so long that no one questions it. It's the bedrock of witness preparation. It's gospel. It's what good litigators do.

But before we give these standard instructions to another witness, we need to think about how slavishly adhering to them can harm our cases and cost us valuable opportunities to win them. And to do that, we need to consider how these instructions probably evolved and what purposes they were meant to serve.

The Standard Instructions

The standard instructions undoubtedly developed after watching witnesses make catastrophic mistakes. Hearing a witness say things that needlessly opened up a line of damaging questions must have led to the advice to answer only the question asked and not volunteer anything. Seeing a witness answer an ambiguous question in the way the witness privately interpreted it, rather than in the way someone else might interpret it, must have led to the advice that, if the question has even a slight ambiguity, just state that you don't understand it. To be sure, advice like that, standing alone and unadorned, logically addressed those concerns.

Then, as litigation became more combative and the stakes rose, our litigator predecessors saw how even the slightest deviation from a good answer could become fodder for exploitation by a wily opponent. Lawyers for witnesses would fear educating their opponents needlessly. Because clients lacked legal training and were unfamiliar with all the ways thoughtless answers could be costly, the clients needed more protection.

In depositions, some lawyers—many in fact—took to the practice of trying to insert themselves between the question and answer, transparently feeding the answer they wanted the witness to give.

Q: How many times did you go to the boat club in August?

Counsel: Objection. If you recall.

A: I don't recall.

Q: Okay. How many times would you *estimate* you went to the boat club in August?

Counsel: Objection. Don't guess.

A: I'd only be guessing and I'm not going to do that.

Q: All right. Let's try it this way. Did you go to the boat club more than once in August?

Counsel: Objection, but the witness can answer the question if he remembers how many times he went to the boat club and in which months.

A: I don't remember how many times I went to the boat club in any given month.

Obstructive practices like these led to rule revisions forbidding lawyers from making speaking objections or other statements telegraphing suggested answers. But the fact that these practices developed at all exposed a fundamental attitude shared by many lawyers—that clients simply can't be trusted to give good or safe testimony. Many lawyers, if they could, would prefer to testify in place of their clients to avoid the problems flowing from ill-advised answers.

This insecurity is at the heart of how most lawyers were trained to prepare witnesses for deposition or cross-examination. It was not enough to tell the witness to answer just the question asked, not to volunteer information, and not to answer

ambiguous questions. Without more, those instructions would not get the job done in a world that viewed a deposition or cross-examination as a minefield where the smallest testimonial misstep could cause an explosion from which the client would never recover.

Lawyers felt they had to condition their clients to view depositions and cross-examination in the same combat-inspired frame of mind. *Don't be fooled if the lawyer who asks you the questions seems friendly. It's a sham. Make no mistake. He's not your friend. He wants to do everything he can to harm you and help his client. This is serious stuff.*

Witness preparation thus became a survival training program from which clients could not graduate until they understood just how badly they could suffer from self-inflicted wounds. They had to see opposing counsel as an enemy whose every question was designed to lay a trap or strike a fatal blow. When clients distilled all the instructions, examples, and pep talks, they were left with the overriding impression that, as soon as they gave their testimonial oath, the less they said the better.

The witness was not there to cooperate with opposing counsel but to make opposing counsel's job harder. Questions avoided were bullets dodged. In a perfect world, if every question could be avoided, no glove would be laid.

In standard witness preparation, these subliminal messages are nearly unavoidable. And many litigators would probably say that's a good thing, precisely how a well-prepared witness should approach an interrogation by opposing counsel.

But lawyers who adhere to this conventional wisdom fail to see that conditioning witnesses to think like this reduces only some litigation risks while inviting other, potentially more dangerous ones. To be sure, the standard instructions reduce the risk of a witness uttering ill-chosen words; and, all other things being equal, avoiding ill-chosen words is better than uttering them.

But even the best prepared and smartest witnesses have no immunity from saying stupid things. How many times have you prepared a client for a deposition, believing you were clear in your warnings about saying too much, only to watch the client give an answer you wished you could have captured in your hands and stuffed back into the client's mouth, all while you sat poker-faced so as not to call opposing counsel's attention to it?

The conventional way of trying to guard against these risks is to repeat the instructions over and over again, drilling them into the witness's head in the hope that the more you say them, the less likely the witness will be to disregard them. Instead, the more you drill and the more you warn, the more you actually court a danger that could be far worse than seeing your witness phrase an answer the wrong way or volunteer something that goes beyond the scope of the question.

Losing Credibility

The essential core of the problem, the real danger, is that of turning a good witness into someone so afraid of saying the wrong thing that he or she fails to say the right thing. It is the danger of turning a likable and trustworthy witness into an off-putting, unbelievable one who looks to be hiding something; the danger of turning a witness who might otherwise have hit a home run into one who whiffs.

Consider, for example, this excerpt from actual deposition testimony, edited merely to protect privacy and omit objections:

Q: Do your responsibilities and duties include making recommendations based on the information you receive about your competitors' products?

A: I'm not sure I understood that question.

Q: What is it about the question you don't understand?

A: I don't understand who you're asking the recommendations go to.

Q: Do you yourself make recommendations?

A: It depends on the information.

Q: And when you make recommendations, are you making recommendations about what the company should do to match its competitors?

A: I do not make decisions for the company.

Q: I didn't ask you if you made decisions for the company. I only asked you if you made recommendations.

A: My job is to simply understand what the products in the marketplace do.

Q: And then you said you sometimes make recommendations; correct?

A: I don't understand.

Q: What about the question don't you understand?

A: I don't remember the question you're asking now.

Q: Do you sometimes make recommendations about what some people in the company should do with respect to the development of products to match the company's competitors?

A: That's too broad of a question for me.

Q: Why is that?

A: Because I said it's too broad of a question.

Q: But I asked if you sometimes do that, and that's too broad for you?

A: I don't know what you mean by "people." I don't know who you're referring to.

One might deduce that, as a result of conventional witness preparation instructions, this witness was conditioned to distrust each question and frightened into thinking any responsive answer could be harmful. When this witness claimed not to understand the questions—questions that, in the context of the examination, any judge or juror easily would have understood—he became a testimonial liability to his employer.

To preserve his credibility, he needed merely to answer whether he sometimes made product development recommendations to others in the company. But because he was so unsure of how such testimony might be used against him or his employer, he became unresponsive, combative, and evasive—someone unlikely to perform well before a jury and whose deposition testimony could well be used as an impeachment tool were his employer to call him as a witness at trial.

One problem with the standard witness preparation playbook is that it is based on unfamiliar and unnatural rules of human interaction. Not only do many witnesses have trouble processing the instructions; witnesses can stumble because the instructions require them to change lifelong habits about *how* they answer questions.

They are being told to dial down the amount of information they ordinarily would provide, but they have no insight about how to calibrate that and no context to know whether they are doling out too little or too much. In many witnesses' minds, the standard instructions reduce to this: Just say as little as possible and you'll do fine.

Another problem is that the standard instructions ignore how third-party audiences—listeners who process language and conversation as ordinary people—would perceive the testimony resulting from those instructions.

Those audiences—often jurors who must make judgments about witness credibility—would listen to the Q&A differently from the lawyer and his over-coached witness. Jurors are not conditioned to hear testimony as a battle of wits or as a word game. To them, the back-and-forth between lawyer and witness is just a form of dialogue. If a witness responds by saying "It depends on what the meaning of the word 'is' is," the witness comes off as deliberately evasive and untrustworthy, rather than as technically accurate.

When people listen to dialogue, they apply a set of assumptions the standard witness instructions ignore. Listeners expect someone answering a question to be cooperative and to explain something if the question, answer, or context seems to call for it. When a witness falls short of those expectations, the people evaluating the testimony assume the witness must have something to hide or cannot be trusted.

Here's a hypothetical showing how the listener's expectations can make the standard instructions perilous. The witness is testifying in a wrongful termination suit about his decision to fire the plaintiff. The plaintiff had received above-average performance reviews, was in a protected class, and was terminated while others with less seniority and weaker performance were not.

The plaintiff claims the supervisor singled her out for termination because she refused the supervisor's advances. There is some ambiguity about whether his comments to her were advances, but he denies engaging in any improper behavior or that his termination decision was for any personal reason. The defense

is that, when the department's budget was cut, the plaintiff's job responsibilities were the easiest to reassign to others.

The supervisor has been given this conventional instruction: *Whenever you can, you should answer "Yes," "No," "I don't know," "I don't recall," or "I don't understand the question." Do not elaborate or explain your answer. That would fall into the category of volunteering—don't volunteer. If I think any elaboration is needed, I will ask you the questions that I think are necessary when it's my turn.*

Here's how it plays out:

Q1: You found my client attractive, isn't that so?

A: I don't understand the question.

Q2: Well, two weeks before you terminated her, you asked her to go out for a drink, didn't you?

A: No.

Q3: Isn't this an email from you to the plaintiff, asking her to join you for a drink?

A: Yes.

Q4: And it says: "Drinks at 5:15 Thursday after work?" with a question mark. "Sunset Grill. Will you be there?" Did I read that correctly?

A: Yes.

Q5: She didn't show up at the Sunset Grill that day, did she?

A: No.

Q6: And shortly after that, you terminated her.

A: Yes.

Q7: And there were other people you could have terminated instead of her, isn't that so?

A: I don't know.

Q8: Well, Sam Brown worked in your department, didn't he?

A: Yes.

Q9: And did you terminate him?

A: No.

Q10: And he had joined the company three months after the plaintiff did, correct?

A: Yes.

Q11: So you terminated the plaintiff, who was senior to Brown, and you kept Brown?

A: Yes.

The supervisor answered Q1 "I don't understand the question" because he thought the question was a trap: a "yes" would support the plaintiff's theory that he had made unwelcome advances, and a "no" would sound like he terminated the plaintiff because he did not find her attractive. So, with no seemingly safe answer, he figured the best he could say—within the confines of the lawyer's instructions—was that he did not understand the question, thinking there was enough ambiguity in the word "attractive" to warrant such an answer.

But that answer made him look evasive because any juror plainly would have understood the question in the sense it was

asked and undoubtedly why it was being asked. And anytime a juror would understand the question, the witness treads on dangerous ground by claiming not to.

What about Q2? The email that later appeared in Q3 was sent three weeks—not two weeks—before the termination. Hence, the supervisor's answer to Q2 was literally true. Indeed, "no" was the only answer the supervisor could have given without straying from the lawyer's instructions.

But that answer left the witness exposed to embarrassment when the later questions about the email arose. Those later questions made the answer to Q2 look like the witness was trying to hide the truth.

How about Q7? The witness mentally choked on the words in the question "could have terminated instead of her." On one hand, he had the power to terminate others, so a "yes" answer

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would have been true, but it would have fit nicely into the plaintiff's case theory. On the other hand, according to the defense theory, he could not really have terminated anyone else without acting contrary to the best interests of the company. In that sense, he did not feel at liberty to terminate others, but a "no" answer would have required an explanation.

Caught on the horns of an ambiguous question, and having been instructed not to volunteer information or give explanations, he defaulted to "I don't know," which—worse—made it sound like he did not even deserve to be a supervisor. While "I don't understand the question" might have been better, he already had used that chit on Q1. Anyway, when witnesses get nervous or feel boxed in, they are prone to answer "I don't know," one of the five answers the lawyer said would be OK to use.

But that response left the poor supervisor wide open to the sequence in Q8–Q11, all of which made his answer to Q7 look, once again, like he was running from the truth.

Better Answers

How would a better prepared witness, unburdened by conventional witness preparation instructions, have answered the very same questions? It might have gone something like this:

Q1: You found my client attractive, isn't that so?

A: Well, I'm not exactly sure what you mean, but I didn't find her attractive in the sense I think you're implying.

Q2: Well, two weeks before you terminated her, you asked her to go out for a drink, didn't you?

A: I think you're referring to an invitation that actually was three weeks before she was terminated and that was part of an invitation that went out to the whole department.

Q3: Isn't this an email from you to the plaintiff, asking her to join you for a drink?

A: Yes, after she didn't respond to the email invitation I had sent to the department. I was trying to get the whole department to come out for drinks as a morale booster.

Q4: And it says: "Drinks at 5:15 Thursday after work?" with a question mark. "Sunset Grill. Will you be there?" Did I read that correctly?

A: Yes, you did.

Q5: She didn't show up at the Sunset Grill that day, did she?

A: No, she didn't.

Q6: And shortly after that, you terminated her.

A: Well, three weeks later I did, yes.

Q7: And there were other people you could have terminated instead of her, isn't that so?

A: Not exactly. I couldn't have terminated others without creating additional problems for my department.

Q8: Well, Sam Brown worked in your department, didn't he?

A: Yes, he did.

Q9: And did you terminate him?

A: No, I needed him because he was working on a key account.

Q10: And he had joined the company three months after the plaintiff did, correct?

A: Yes.

Q11: So, you terminated the plaintiff, who was senior to Brown, and you kept Brown?

A: Yes, for a good reason. Would you like me to explain?

These answers violate the very heart and soul of conventional instructions on how witnesses should answer opposing counsel's questions. Even though these are yes or no questions, the witness gave lots of answers outside the traditional "Yes," "No," "I don't know," "I don't recall," and "I don't understand the question."

What's more, the witness volunteered information. The witness improved on the questions. The witness earnestly attempted to answer questions that were ambiguous or that he could have said he did not understand. The witness treated the interrogation as if it were a normal conversation, not formal testimony.

And all to great effect. Nothing in what the witness said sounded evasive. To the contrary, the clarity and naturalness of the answers made the witness sound credible and cooperative, as if he was trying to help the jury understand what happened. And the questioner scored no points, getting not a single useful piece of testimony.

Rather, the witness was able to advance defense themes, all while being cross-examined. When he offered to explain his response to Q11, he put the examining lawyer in a box: If the lawyer declined, the lawyer would seem afraid of exposing the truth to the jury; if the lawyer acquiesced and permitted the explanation, the jury would hear much that surely would hurt the plaintiff.

Conventionalists will argue that this approach is too risky, that explanations should be saved for redirect, and that the way to eliminate the scars from a harmful cross-examination is with a skillful rehabilitation. The goal, however, should be to make redirect unnecessary and to obviate the need for rehabilitation at all.

Simply put, if the witness needs to be rehabilitated, it means the witness has been wounded. Maybe rehabilitation will succeed; maybe it won't. But proper preparation should prevent the wounds in the first place, thereby avoiding a whole lot of hurt to our cases.

Here's why redirect and rehabilitation, though frequently used and often necessary, are flawed solutions to the problem of a witness who gives poor testimony. For one, time passes—sometimes too much time—between when opposing counsel clobbers the witness and when we get the first chance to try to fix it. By the time it's our turn to repair the damage, the stain has begun to set. The jury may already have formed an impression of the facts or of the witness, and our burden of persuasion is much more challenging.

We also risk looking like we're tossing up imaginative afterthoughts or—worse—like we're trying to camouflage or spin bad facts. And we may not be able to establish the context for the explanatory facts. If we fail in that attempt, the jury may not be able to put it all back together. Inevitably, we are in danger of telegraphing that our case has suffered unwanted blows.

And lawyers are seldom positioned to do an effective redirect and rehabilitation on every flub that needs correcting. Even if we could remember all of them, we still would need to know or recall all the facts we promised the witness we would bring out on redirect if the need arose.

Of course, the witness has the superior knowledge of the explanatory facts. Our knowledge of them may be weak or nonexistent.

Nor can we readily learn them or go over them with the witness. Rarely is there an opportunity to brief or debrief the witness between the cross-exam and the redirect. In some courts, it's expressly prohibited.

Further, we are hampered by the rules of evidence. Some judges will require, even on redirect, the use of open, non-leading questions. Unless we are telepathic, though, we may need a

fair bit of luck to get the witness to understand exactly what information we're trying to elicit as we attempt to undo the harm from opposing counsel's cross-examination. And even when we can plan the redirect with the witness, it may come off sounding too rehearsed or contrived.

Depositions

Attempts to fix bad testimony are not just trial problems. They also are deposition problems.

Most of the time, and often for good reason, we decline the opportunity to examine clients and friendly witnesses at their depositions and instead reserve our questions for trial. Then, in the months between those depositions and the trial, if there is bad deposition testimony, it just sits there waiting to be exposed to oxygen and burst into flames.

What else might we do? Written corrections are not an ideal solution. In some courts, the only allowable corrections are for mis-transcriptions, not substantive changes, and many courts frown upon whole blocks of self-serving transcript changes that put everything in context and a better light, as might be done during redirect.

Even if we could prepare and serve dream errata sheets, think how much grist that would provide for cross-examination at trial: *Who wrote this errata sheet—you or your lawyer? Your lawyer reviewed this before you signed it, right? What you say in your errata sheet is different from what you said when I asked you the question in your deposition, isn't it? When you signed this errata sheet, you thought that the answer you had given under oath in your deposition was not as helpful to your case as what you and your lawyer wrote in this errata sheet, correct?* Each transcript change offers ammunition to opposing counsel.

There's another problem with bad deposition answers. In many jurisdictions, if the other side moves for summary judgment based on your client's deposition testimony, your client will not then be permitted to contradict the deposition testimony to create a disputed issue of fact. Even if you think your client's affidavit simply is offering mere context for the deposition testimony or some additional facts not actually in conflict with it, there is always the chance the court will read the affidavit differently and grant your opponent's motion to strike it.

For all these reasons, there really is no substitute for having your client's testimony come out the right way the first time it is given.

After-the-fact efforts to correct it—whether with errata sheets, affidavits, redirect examination, or more intensive rehabilitation techniques—are poor and risky substitutes for having a well-prepared witness testify properly on the first go-around.

How to Prepare Witnesses

So what is the better way to prepare witnesses?

It begins with recognizing that the governing philosophy no longer should be “the less said the better” and that in dealing with witnesses one size does not fit all. Witnesses have different skill levels, different abilities to absorb and apply what we cover with them in our prep sessions. Some witnesses know or can be educated about the nature of the dispute; others do not and cannot. Some witnesses communicate well; others, not so much.

Likewise, no two cases are the same. The facts, of course, always differ, as does each witness's place and importance in the story and the way the testimony will be used. Some witnesses have only helpful things to say; others bring baggage.

Witness preparation must be tailored to the witness and the case, and not simply be a set of rote instructions identically given to each witness all the time.

Simply put, if the witness needs to be rehabilitated, it means the witness has been wounded.

If evaluation of the witness and her role in the case suggests the better course is to keep the witness on a short rope, the conventional witness preparation instructions probably make sense. But if the witness is a reasonably good communicator, has a reasonably good command of her role in the story, and has a fair understanding of the importance her testimony will have in the resolution of the case, then a different type of preparation would probably be better.

So this should be the first principle of all witness preparation: *Know your witness.*

Before we can determine how to prepare the witness, we must figure out what good and bad the witness is capable of doing on the stand. That means spending time with the witness to learn about her role in the events and importance to the case; whether the witness's testimony will do more good than harm; whether the witness can speak plainly and explain complex facts in simple fashion; whether the witness uses words and expressions in the way most people would understand them; whether the witness comprehends the facts, the issues, the process, her own significance, and so on.

When the witness impresses with enough positive testimonial attributes—and many witnesses do—then we should give instructions sounding something like these:

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Cases are decided by evidence, and the evidence usually comes from the mouths of people like you who know things that bear on the case. This makes you a “witness” and makes the things you have to say “testimony.” But don’t let those words scare you.

As a witness, you’re simply someone who knows something that the judge or the jury or the lawyers in the case may want to hear. And “testimony” is just a fancy label we give to things that witnesses have to say.

I don’t want you to think that giving testimony is something you need to be afraid of. It’s not. Basically, it’s just answering questions, and you do that all the time. In life, you’ve had lots of experience answering questions; and, when you give testimony, you’re going to draw on that experience and rely on many of the same skills you use in ordinary conversation.

But there are some things about testimony that are different from everyday conversations, and we need to go over them.

First, if you forget everything else I tell you today, please don’t forget this: You must tell the truth. That’s really the only rule about testifying. Everything else is just commentary.

Second, you need to understand that when the lawyer on the other side is asking you questions, he’s going to try to use your answers—your words—to tell his story. He wants your answers to fit into a narrative that he would like to persuade the judge or jury to believe.

Some lawyers have a wildly imaginative story that’s very different from what witnesses know to be the truth. Other lawyers want to tell a story that’s pretty close to what witnesses know is true, but the lawyer might not have all the facts, might be misinformed about some of them, or might be inclined to shade them a certain way to help his client.

Of course, it’s also possible that we don’t have all the facts or that we might be misinformed, but I don’t think so. Either way, this case is going to depend on whether the judge or jury believes the other side’s story or ours. That’s why your testimony and how you give it is very important.

One of the things that some opposing lawyers do when they want to get facts that help their story is to ask a limited set of questions to witnesses on the other side of the case. These questions are designed to bring out just enough facts that the lawyer thinks will support the story he wants to tell.

He won’t ask you about everything because much of what you have to say doesn’t fit his story and may well contradict

it. So he’ll ask you about only some things, and he’ll try to keep you from saying anything else. Or he might ask you a question that’s designed to get you to state only some information, without explanation or context, to create a false impression that fits his story.

In ordinary conversation, this doesn’t happen too much. If someone asks you a question, you pretty much have free rein to answer it as you wish so that you can clear up any misunderstandings and any false impressions.

But when you give testimony, the opposing lawyer is going to ask questions with information already built into them and ask you to agree. These usually are in the form of some statement, followed by “Isn’t that right?” These are called leading questions and for good reason—the lawyer is trying to lead you to say things that will fit into his story.

Some of those things you may agree with, and, if you do, you should say so. But sometimes the information is not exactly correct, or it might be technically correct as far as it goes but create a false impression unless other information is also given.

That’s what I want to talk to you about, because you shouldn’t answer a question in a way that would leave a false impression or that suggests you agree to things that you don’t necessarily agree to. That would be contrary to your oath to tell the truth, the whole truth, and nothing but the truth.

Some lawyers would advise that, when you get that type of question, you should simply say that you don’t understand the question, that you don’t know, or that you don’t agree. My advice is somewhat different.

In ordinary conversation, if you understand a question, or you can tell what the person is asking, or you have some information that is responsive to the question, you wouldn’t pretend otherwise and duck the question. If you did that, you would sound like you had something to hide, and we don’t want the judge or jury to think you’re being uncooperative or trying to hide anything.

The goal is to answer every question you can truthfully answer and to avoid being misunderstood in the process.

So if ordinary people would understand the point of the question and if you understand the point of the question, you shouldn’t say that you don’t understand it, even if there’s a word or phrase in it that you might not understand. Instead, you should ask the lawyer what he means by that word or phrase, or you should tell him how you understand the word or phrase and then give him your answer.

When you do that, your answers will sound and be natural, just like in regular conversation. If in regular conversation you would give an explanation with your answer, then you should do so when you’re testifying. If the lawyer tells

you he just wants a yes or no answer and nothing else, but you feel a need to give some explanation, you should say “I can’t answer that yes or no; may I explain?” Nine times out of ten, you’ll get a chance to explain, but if the lawyer or judge won’t let you do that, then you should say “Well, I can’t answer it with just a ‘yes’ or ‘no,’” and you should leave it at that.

Remember, the judge is a regular person and so are the people on the jury. They will interpret your answers as if you were giving them in ordinary conversation. If regular people would expect you to qualify your answer to prevent someone from drawing the wrong conclusion, you should qualify your answer when you’re giving testimony.

On the other hand, don’t be overtly combative with the lawyer who’s asking you the questions. Otherwise, the judge or jury might think you’re hiding something. That doesn’t mean you have to agree with the lawyer or his questions. If you don’t agree with something, you certainly should say so, and if the truth would be aided by an explanation, then by all means explain.

Here’s a made-up example of how a simple “yes” or “no” would leave the wrong impression: Let’s say the lawyer establishes through some questions that you were present when an accident took place and that people at the scene were hurt. If the lawyer is trying to show that you somehow contributed to the injuries by not calling 911, he might ask whether you called 911 when you saw the victims lying on the ground. If you didn’t call 911, a “no” answer would be technically correct but might leave a false impression that you were indifferent to the victims or that you could have taken action to help them, even though the truth is that you were concerned but unable to call 911 because there was no phone handy.

In that situation, instead of just a simple “no,” you should answer “No. I wanted to but I didn’t have my phone with me.” Giving your answer in full context makes it the truthful answer.

Let’s also focus on “why” questions for a moment. If the opposing lawyer asks you a “why” question, that’s an invitation to tell your side of the story. The lawyer is hoping you won’t have much to say or that your reasons really aren’t very good ones. You should be as thorough as you need, so that the listener can see the facts through your eyes.

Of course, before answering any question, you should make sure that you understand it and you should ask for an explanation of anything you don’t understand. Think through your answer carefully before you start to speak. If you answer impulsively, it might be inaccurate or misleading.

Let’s also talk about what it means to say “I don’t recall.” Sometimes, a question might call on you to say what you remember about a particular event or conversation, but

your memory of it might be vague. Some lawyers might advise you to answer those questions by saying simply that you don’t recall, rather than to state what’s in your vague memory. My advice is different.

If you have a memory, even though it’s vague, it wouldn’t be truthful to say you don’t recall. Instead, you should answer whatever it is you do recall and qualify your answer by saying “To the best of my memory” or “If my memory serves me” or words to that effect. ”

At this point in the preparation, it’s smart to do some practice Q&A to see how well the witness performs under these instructions. Does the witness over-answer? Appear too combative? Not share enough information? Pass up opportunities that call for explanatory context?

Once we see how the witness actually handles different types of questions, we can adjust the instructions. The goal should be to customize the instructions to fit the witness and the case, and avoid the cookie-cutter approach that treats all witnesses the same and restricts them all with the *pro forma* standard instructions.

Within this approach, preparing witnesses for interrogation by opposing counsel should be guided by these teachings:

- A testimonial occasion is a search for the truth.
- Saying too little can leave false impressions, impair credibility, or otherwise harm the case as much as saying too much, sometimes even more so.
- The best time to give explanations, to put answers in their proper context, and to dispel mistaken impressions is when the question is first answered.
- Listeners will apply the same interpretive judgment to testimonial answers as they apply in ordinary conversation.
- A claimed failure to understand a question will seem incredible if the question would be understood by a regular person in regular conversation.
- Witnesses are people, and people differ in their testimonial skill and capacity.

In short, our standard timeworn witness preparation techniques carry more downside risk than we realize and often are ill-suited for modern litigation. Instead, we should give our witnesses the confidence to answer questions with real insight and facility, with care to be sure, but often as they would in ordinary conversation.

The historic core of conventional witness preparation—the idea that less is more—is not always a helpful guidepost. In many instances, more is more. ■