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When the Executive Has to Take the Stand

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NOT SO LONG AGO, persuading corporate executives that they needed extensive preparation before testifying in a legal proceeding was a battle. Many confident, articulate executives were convinced they could just "go in and tell my story," and they were insulted by the notion that they needed some lawyer to prepare them. Too many experienced lawyers didn't push back.

Then came an explosion of high-profile lawsuits and investigations, and with them a parade of highly successful executives who proved to be very bad witnesses. Gates, Stewart, Libby, Kozlowski, Lay - the list goes on. Now executives faced with the prospect of being a witness may wonder if there is some reason this happened, and if it could happen to them. The answers are "Yes," and "Yes." It happened because executives failed to understand that they were entering a different and dangerous world. In this world, it's not just about experience and intelligence. It's about preparation, and understanding the audience, the rules, and the "core themes" of the case. Executives who have already spent years mastering the corporate world must nonetheless understand it takes commitment, time and effort.

The first requirement is to understand the audience. Every proceeding and witness situation is unique, but in most litigation the ultimate audience is the jury or other finder of fact. It's fashionable to bash juries, but it's easy to expect too much of jurors and too little of ourselves.

Lawyers and witnesses are teachers. If our students aren't learning, it is usually a shared responsibility.

Juries are composed of individuals. Assume they are ordinary people doing their civic duty and want to understand what a witness is saying. Pick one - let's say, juror number six and ask: How do we reach him?
At the beginning of the testimony in a complex trial, one corporate witness testified as follows:

Q: Would you please introduce yourself to the jury?

A: My name is Bob. I'm a consultant to the company.

On the witness stand, that's a lost opportunity to humanize the witness. Preparation should include recalling the stories that can make you real to the jury: the summer job that got you interested in your field, the family tragedy that changed your direction, the mentor

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who inspired you. For most people, that kind of thing won't come out unless it's explored and discussed in advance.

You need to humanize the company, as well. Polls show that the public image of corporations is negative. Jurors need context to get past that stereotype, and the witness has to provide it. The company has a story to tell. It started somewhere, saved lives or helped others, or fostered interesting people and projects. Find those stories and prepare for opportunities to present them.

SIMPLIFY THE LANGUAGE

Every profession, industry and specialty has a language. To reach juror number six, a witness has to move beyond that language. Take this exchange:

Q: What management position did you hold?

A: I was responsible for all the R&D projects for BASG for filler metals.

Here, in one short answer, are three terms that juror number six may not know: "R&D," "BASG" and "filler metals." He's left with two bad choices: Ignore your answer or spend the next several minutes of your testimony trying to figure out what you meant. Overcoming years of accumulated jargon is difficult work, but it's necessary.

It's also necessary to simplify the message. The experienced corporate executive has a lot of information and under attack may want to get it all out. But juror number six doesn't need to know everything. Avoid getting him distracted and lost in detail. He needs to know only what's really important. (In one complex products liability warnings case, I prepared witnesses by using a simple sign that said "Stop.")

TEN RULES

Testimony is not a conversation. It has its own language and its own rhythm. Question, pause, answer, stop. Guessing, interrupting and volunteering are inappropriate and dangerous in the narrow and artificial world of testimony, where every word is taken down under oath and may be picked apart.

In this world, the questioner appears to be in control. It's an illusion, but even the most accomplished executive can fall victim to it. Remember, the witness has the right and the responsibility to take control.

When it comes to meetings or other interactions, most executives know the way to take control of the situation is not by shouting the loudest, but by utilizing some clearly established techniques or rules. So it is with testimony, and here are 10 rules for doing it:

1. **Take your time.**
   Slow it down, think it through, and control the pace. Lawyers want rapid-fire Q&A, but if the lawyer makes a mistake, no one cares. If the witness makes a mistake, it can live on forever. From the very first question, slow it down.

2. **Remember you are making a record.**
   You are dictating the first and final draft of a very important document, with no rewind button and no second draft, so think about your language. Certain words can take on special meanings. Learn what they are in your case, remembering words can have different meanings to different people. There will be only one transcript.

3. **Tell the truth.**
   This seems obvious, but truth in a witness environment is a very narrow concept. It's what you saw, heard or did. Everything else is a guess.

4. **Be relentlessly polite.**
   This will be personal. They're attacking you. But remember that a witness who is angry or defensive isn't thinking clearly and isn't controlling the language or the pace. Lawyers know that. A few garbage questions, and off we go! It's a scam. Don't fall for it. Be relentlessly polite and focused.

5. **Don't answer a question you don't understand.**
   Is it vague language, strange phrasing or distorted assumptions? Is it just too long to be clear? Don't answer it. Just say, "Please rephrase the question."

6. **If you don't remember, say so.**
   Answer clearly. Just say, "I don't recall," and stop.

7. **Do not guess.**
   Much of what makes people good conversationalists and intelligent, intuitive people involves guessing. But guessing is inappropriate and dangerous for a witness.

8. Do not volunteer.
"Question, pause, answer, stop." A witness must become comfortable with the silence of waiting for the next question.

9. Be careful with documents.
Documents are just written versions of what someone believed. Treat them mechanically. There is a simple, unvarying protocol witnesses should follow: If you are asked a question that relates in any way to a document, ask to see the document. Don't allow anyone to draw you into a debate with a document that is not in front of you. You can't win.

There are three issues with any document: credibility, language and context. You cannot carefully consider each of them unless you read it. Read all of it, slowly and carefully. Then ask for the question again. It's basic fairness. They've read the documents and picked out one little piece to ask about. Now that you've read it, the question will be clearer (and you may get a better question).

10. Use your counsel.
Listen to everything that is said, ask questions when you can and take breaks before you need them.

Most of these rules are difficult for executives. They are contrary to what they're used to, and often counterintuitive. But if they are practiced, they can impose a degree of discipline and control on the process that makes it significantly more fair and productive.

CORE THEMES

A key part of the witness preparation process is to develop and discuss a set of clear and simple core themes for the case. The conventional wisdom used to be to say as little as possible in a deposition, on the ground that it's their deposition. They are trying to build their case, so don't help them. There is still some truth in that, but in many ways, it is outdated.

Litigation today takes longer, is more complex and often involves issues that go beyond the narrow facts or parties of the case. Whether in deposition, trial or other proceedings, witnesses need to maintain the high ground, but do so in a careful and disciplined manner.

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Keep in mind the basic themes underpinning your case and your testimony. How are they best expressed? What challenges will they draw? How do you find opportunities in all phases of your testimony to bring them out?

Witness preparation is an important part of the litigation process. It involves a careful review of the audience, the rules and the core themes. It should also include extensive and realistic mock testimony. Learning how to testify is like learning to ride a bicycle: You can't do it by talking about it. It might require some trauma and a few bruises. To master this strange world, you need to enter into it, and then review what you've done.

The legal profession too often has failed corporate clients by not preparing them for the challenges of being a witness, sometimes with disastrous consequences. The damage can go beyond one case and reverberate for years to come.

If you are in any business in America today you are in the litigation business too, or eventually will be. You need to accept that and understand the process in order to manage it. An investment in witness preparation can be an extraordinarily productive one financially and, as one executive I've prepared has commented, it also will help you sleep better at night.

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