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Powerful witness preparation: Don't answer a question you don't understand!

- » As a witness, you have a right to expect clear and fair questions.
- » If you answer a question, it will be assumed that you agree with anything in the question that you do not clearly dispute.
- » Keep asking that the question be rephrased until it is clear to you.
- » Take each question one at a time and watch for hidden assumptions.
- » "Questioning the questioner" enhances a witness's stature as the one in control of the testimony.

In this series of articles, lead author and seasoned trial attorney Dan Small sets forth ten, time-tested rules to assist you in the critical task of preparing witnesses. Robert F. Roach assisted Dan in this series by providing additional "in-house" perspective and commentary. The first installment of this series was published in our January/February issue.

Rule 5: "Don't answer a question you don't understand!"

In the futuristic movie, *I Robot*, Will Smith plays a detective who speaks to a computer-generated hologram of a dead scientist. When the detective's questions veer off from being clear and simple, the hologram intones, "I'm sorry, my responses are limited. You must ask the right questions!" Real witnesses, even more than holograms, have both a right and a responsibility to insist on clear and fair questions.

In a casual conversation, it's common for one person not to understand what another is asking, but it's also unimportant. The conversation flows along in a new direction, and if the person who asked the question cares, he or she can bring it back. Precision is not the point, and if it gets in the way of the conversation's flow, it loses every time.

In the unnatural environment of being a witness, precision is crucial. When everything that's said is being taken down under oath and picked apart, the question becomes part of the answer. When you answer a question, it will be assumed that you understood the question and that you agree with anything in the question that you do not clearly dispute.

The key is taking control. You are the witness; this is your statement. You have a right to clear, simple questions and to only answer questions you understand. Otherwise, *don't answer*. Just say, "Please rephrase the question," and stop. There is no limit to how many times you can ask until you get a question you understand. Do not get into a discussion over what you did not understand and don't help the questioner by saying, "Do you mean X or do you mean Y?" He or she may have meant Z, but now you'll be asked all three questions!

The three tests

To fully understand a question, the witness must apply three tests: Clarity, Comprehension, and



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Comfort. Until a question has passed all three of these tests, the witness should not answer it!

Clarity

Clarity means only one thing: whether the wording of the question was clear *to you*. It doesn't matter whether the questioner thought it was clear, or *why* it wasn't clear. Even the best questioners phrase things badly, and even the best witnesses get distracted or confused. It doesn't matter whose "fault" it was that you felt the question was unclear. Ask that it be rephrased, and keep asking until it's clear to *you*. If the questioner acts surprised or irritated, don't be intimidated. Keep your cool (see "Rule 4: Be relentlessly polite" in our July/August 2012 issue) and keep demanding simple, clear questions.

Comprehension

Comprehension means that even if you heard the words, do you really understand what's being asked? It often goes back to language (see "Rule 2: Always remember that you are making a record" in our March/April 2012 issue). Which of the various meanings of a word is the questioner using? To focus so completely on one question is hard work and unnatural. We're more used to a question just being part of the overall flow of the conversation—a prompt, a follow-up, a show of interest. As a witness, the actual words of the question are what matter the most. Your only job is to comprehend what that question is asking. Don't listen to what you think the question might or ought to be. Take each question one at a time. Listen only to what it is, and then ask yourself if it makes sense. If it doesn't, don't answer it. Just say, "Please rephrase the question." If you do understand it, answer it simply, then stop and wait for the next question.

Comfort

Comfort means the words themselves seem clear, the question is comprehensible, *but* are

you comfortable with the way it's being asked? The most common source of problems here comes from the *assumptions* that are contained in the question. The classic example is the witness who is asked the "yes or no" question: "Have you stopped beating your wife?" A simple question on its face, but by asking if you've "stopped," the question *assumes* that you "started"! You can't answer the question without essentially agreeing that you've been beating your wife.

Almost all questions contain assumptions. Think about something as basic as "Isn't it true that it's a nice warm Thursday today?" A seemingly simple question, yet filled with assumptions. Some are obvious. If today isn't Thursday, the problem is so apparent that, even in casual conversation, you might stop the flow to correct the date.

The problem gets worse when the assumptions get more subjective. What does "warm" mean? If I use that word with people in Florida, it means one thing, but with people in Alaska it may mean something very different. In a casual conversation, no one is being that precise, everyone generally understands the context, and even if there is any misunderstanding, it doesn't matter that much. A witness does not have those luxuries. If you accept someone else's assumptions, you have put your word, and your future, behind a statement you may not understand or agree with.

The solution is simple: If a question contains assumptions that you either don't understand, don't agree with, or just aren't comfortable with, don't answer it. Either ask that it be rephrased or directly challenge the false assumption. This is "questioning the questioner." It enhances a witness's stature as the one in control and derails poor questions.

The other part of Comfort is that you must be equally comfortable with your answer. The most important issue here is "yes or no." Despite the examiner's wishes, many questions cannot

be answered simply yes or no. Listen carefully to the question, think about the assumptions it contains, and if you have any uncertainty, do not give a simple “yes or no” answer. Ask that it be rephrased, and if that doesn’t work, challenge the “yes or no” assumption: “I’m sorry, but I can’t answer that with just a yes or no.”

There are as many reasons why you might not understand a question as there are possible questions. The point is that it doesn’t matter why or how you don’t understand. This process is too important and precise to “fudge” by answering a question you don’t understand. Don’t do it. Just say, “Please rephrase the question.”

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Common wiggles and squirms

We teach witnesses to impose the discipline of not answering a question they don’t understand: just say, “please rephrase the question.” It is tough but essential discipline for any good witness. Now the challenge is what happens next.

A dirty little secret of the legal profession is that this really works. Witnesses say all the time, “That is not going to work. He is just going to ask the same question again.” If he does, so what? What has the witness lost? However, in an extraordinary percentage of times, those four magic words “Please rephrase the question” will work. Why? For any number of reasons, including:

- ▶ The questioner really was trying to pull a fast one and now they’ve been caught.
- ▶ The questioner made a mistake.
- ▶ The questioner has no memory of it, and now they have to try something else.

Whatever the reason, with this simple request you often get a clear and fair question.

Precisely because this discipline *does* work, lawyers will go to great lengths to avoid it. It’s important for witnesses to be prepared on how they’ll do it.

Every parent knows that when you try to impose rules and discipline on children, they will try different ways to wiggle and squirm out from under. Questioning attorneys are much the same. If a witness imposes the discipline of insisting on clear and fair questions, of saying “please rephrase the question,” lawyers will seek to “wiggle and squirm” out from under, and keep doing things their way. One big difference, though, is that while children have a seemingly endless variety of wiggles and squirms, the circumstances of a witness environment leave the questioner with fewer options: basically only three.

The court reporter

The most common “wiggle and squirm” is to use the court reporter. It’s very simple: The questioner asks a bad question, the witness says “Please rephrase the question,” the questioner says “Would the court reporter please read back the question.” There’s nothing wrong with this. On the contrary, it gives everyone a chance to take a breath and listen to it again. The problem is that, time and again, unprepared witnesses think “Gee, if the court reporter can read it back, it must be okay.” No! Court reporters are remarkably good at what they do; they do not edit, modify, or do anything to improve the words that come out of the questioner’s mouth. If the question was gibberish, the repeat will be gibberish.

More important, the questioner has not done what the witness asked. The questioner was not asked, “Please *repeat* that bad question.” The

request was “please *rephrase*.” Don’t give up, and don’t give in. If the questioner’s response is to have the court reporter mirror back the same bad question, all the witness should do is to mirror back the same reply. Listen, pause, then say, “Please rephrase the question.”

The follow-up question

The second classic “wobble and squirm” is a challenge from the questioner, in the form of a follow-up question. The questioner asks a bad question, the witness says “Please rephrase the question,” and the questioner says, “What

was wrong with my question?” or “What didn’t you understand about my question?”

The questioner has now posed a new question, a follow-up, and we need to consider the options for

responding. There will be questions where the witness can easily identify a word or phrase that troubled them, and can respond simply, “I’m not sure what you meant by _____.”

However, the ability to be that precise—and limited—in finding a question’s flaws is surprisingly rare. Keep it simple. The truth is that most bad questions are bad, at least in part, because they are too long. When teaching lawyers how to try cases, we always warn them not to ask questions that are more than 6-8 words long (which if you try it, is very short). Longer than that, and the question is bound to be compound, confusing, and vague.

The flip side is equally true for witnesses. Give the questioner the benefit of a few extra words, if you want, but if a question is more than 8-10 words long (still pretty short), alarms should go off. Don’t answer it. It is likely neither clear nor fair. No witness can keep track of the whole

thing. So the majority of the time, the best, most truthful, and easiest response to the follow-up question is, quite simply, “It’s just too long and confusing. Can you break it up for me?” That’s all. End of dialogue. “It’s just too long.”

The obstinate child

You’ve seen this child, in the corner, stamping their feet in frustration, screaming “No, no, no I won’t!” Here is the lawyer’s version: The questioner asks a bad question, the witness says “Please rephrase the question,” and the questioner says, “No, that’s the best I

can do” or “No, I think it’s straightforward.” Sadly, I read transcripts all the time where unprepared witnesses obviously think, “If that’s the best he can do, I guess I have to answer it!” No! If

that’s the best he can do, too bad! It’s the witness’ testimony, not the lawyer’s. Questions have to be clear and fair to the witness, not the questioner. Here, the questioner has done nothing to fix the problem with the question. Don’t answer it! Just say, “I’m sorry I still don’t understand. Why don’t you ask another question?”

The great Spanish novelist, Miguel de Cervantes, said, “Forewarned, forearmed; to be prepared is half the victory.” The more a witness knows what’s coming, the better they are able to deal with it. Teach the discipline *and* the response. *

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