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Powerful witness preparation: The most important person

- » The most important person in the room is the one who says nothing: the court reporter.
- » Consider your words carefully—the reporter’s machine is cold, mechanical, and humorless.
- » Words have different meanings: think about *manager*.
- » Avoid using jargon that jurors may not understand or find confusing.
- » If you are not sure what counsel is asking, ask for clarification rather than answering the question.

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.

Corporate officers and employees communicate all the time: during meetings, telephone calls, presentations, and conferences, to name a few examples. However, even a person who is a skilled communicator in business settings may find testifying under oath challenging. As we explain in Rule 2, it is critical to prepare your witness for the unique experience of answering questions under oath and having the testimony transcribed word-for-word.

Rule 2: Always remember that you are making a record

One of the many unnatural things about being a witness is that often the most important person in the room is the only one who doesn’t say anything: the person making the transcript or taking the notes. A witness cannot “unring the bell.” Once words come out of your mouth, they are committed to the cold written page, under oath. Even humor and

sarcastic remarks read like factual statements in a transcript. Every word is there, for all to see, for all time.

What is the answer?

Time

First, slow down and be precise. Answer each question as if you were dictating the first and only draft of an important document. (*You are!*) Consider each word carefully. This is extremely difficult to do. You cannot dictate a document this important quickly, casually, or “off the cuff.” You need to be fully prepared, and then approach it with the right sense of pace, care, and precision.

Language

Second, be aware of the power of language. When every word is transcribed and under oath, language takes on an extraordinary importance, far beyond normal conversation. Then, when two or more sides are fighting over what those words mean, and each is trying to use them for their own purposes, the problems multiply. We must be aware of, and carefully consider, each word in the question. Most



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language issues come within three interlocking worlds: “English,” jargon, and “legalese.”

“English”

Open any dictionary at random, to any page, and you will see a basic truth: there are very few “simple” words. Most have more than one meaning. In the heat of litigation, those differences can be blown up in degree and significance. If the witness is not 100% clear about how the questioner is using a word, they *cannot* answer the question. If they answer, the questioner will assume their definition is the one in play.

One common tactic is for questioners to try to bully their way through language problems. Consider this exchange:

Q: Who did you report to?

A: Please rephrase the question.

Q: What don’t you understand about my question?

A: I’m not comfortable with “report.” I had consultants and investors, but “report” sounds like I’m in the Army.

Q: You know what the word “report” means, don’t you?

A: Well, yeah.

The witness gave in to a question with the unspoken “you idiot!” at the end. Prepare the witness by explaining that in such circumstances, the issue is not whether you’re too stupid to know what “report” means (which is how the witness may feel); the issue is whether the questioner is too stupid to know that the dictionary has twenty-five different definitions of the word, and you didn’t know which one she meant! Be sure you know, *before* you answer.

Jargon

Every profession, industry, region, and endless other categories, has its own language. We call it jargon. In Webster’s words, jargon is “the technical terminology or characteristic idiom

of a special activity or group.” But like so many other words, jargon has multiple meanings. When Juror #6 hears jargon, it comes across less as impressive technical know-how, and more like Webster’s *next* definition of the word: “obscure and often pretentious language marked by circumlocutions and long words.” Witnesses need to work hard to stay away from jargon, and to recognize when they fall back into it, and stop to explain.

“Jargon interferes with communication in so many ways. Jurors don’t understand it. They don’t like it and often feel it’s condescending. It can make the witness seem cold and distant, talking about human issues in dehumanizing terms.”

Jargon interferes with communication in so many ways. Jurors don’t understand it. They don’t like it and often feel it’s condescending. It can make the witness seem cold and distant, talking about human issues in dehumanizing terms. Lastly, its impact can go far beyond the words themselves: Juror #6 may miss the next several minutes of testimony, because he is still trying to figure out the jargon, and eventually may turn off entirely. Help your witness to understand what kind of jargon he or she speaks, and how to avoid it.

“Legalese”

In every case there are legal standards and concepts that have to be broken down from their confusing language, and explained in clear and simple terms. Counsel must help the witness understand what they are, so

they don't stumble upon them blindly—or get lured into them unsuspectingly. Then witness and counsel must be ready to deal with them during testimony.

The greatest language challenges come when a word exists in the intersection of two or three of these separate circles, when a word has different meanings in English, jargon, and/or legalese. Then, it is particularly important for the witness to be 100% sure which meaning the questioner intended, or he/she cannot answer the question.

One quick example: the seemingly innocuous word “manage” or “manager.” In English it can mean a range of things, from managing a baseball team (the boss), to managing a football team (picking up the towels, etc., the coach is the boss), to managing a checkbook, to managing to escape a dull party. In the jargon of some

businesses and industries, “manager” has a particular meaning—which may or may not mean the real “boss.” In legalese, many state legislatures, in their wisdom, gave the corporate secretary of an LLC the name “manager,” even though such a statutory manager may only be there to sign documents and have little or nothing to do with running the business. Which meaning does the questioner mean?

Remember the most important person: the court reporter. He/she doesn't know what the word means, unless either the questioner or the witness makes it clear. Insist on the discipline of clarity. *

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