

Mind the gaps, fellow counsel

by Daniel I. Small

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“Why is this difficult?”

It’s a question many witnesses have asked. The answer is that there are surprising and enormous gaps between a witness’s real-world experiences and the very strange, unnatural world of being a witness.

The reasons are easily stated, but their impact is profound:

It’s under oath.

Everything is transcribed.

Everything will be picked apart.

Each of these extraordinary facts is far beyond a normal person’s experience. Put together, they form the basis for a series of critical gaps. To prepare a witness, lawyers must help the witness — and themselves — define, understand and bridge each gap. This column will look at the first two, perception and audience. Conversation and control will be addressed in the next column.



The perception gap

The problem:

Witness: “Lawyer wants me to toe the company line.”

Lawyer: “I want to help witness tell the truth.”

The solution: There is, for a surprising and disturbing percentage of witnesses, an extraordinary “perception gap” between what the lawyer assumes he or she is asking and what the witness assumes the lawyer wants.

One small example: As part of my work with witnesses, I frequently get called by clients around the country to prepare executives or others for depositions or other witness situations, often working with existing trial, corporate or personal counsel.

Several years ago, I walked into the conference room in which counsel and the witness were waiting and started to introduce myself to the witness. She interrupted me and said, “I know who you are. You’re the guy who’s come to tell me what to say!”

I responded: “If that’s your understanding, then that guy is leaving.” I walked out, waited five minutes and returned, introducing myself as: “The guy who’s come to help you tell the truth.”

Where does that gap come from? Most lawyers think of themselves as ethical professionals, there to give advice and help guide the witness through the process. We’re there to have an open and honest dialogue, to help the witness understand and tell the truth. However, the sad reality is that is not how most witnesses develop their perceptions of lawyers, particularly trial lawyers.

Those perceptions are developed in very different contexts. On TV, unethical and devious characters get the best ratings. On the Internet, stories of outrageous conduct by lawyers abound. From friends and family, tales of sleazy lawyers are far more interesting to tell, and thus far more frequently repeated, than tales of ordinary professionals acting appropriately.

So it should come as no surprise that so many witnesses assume the attorneys are there not to get at the truth, but rather “to tell them what to say”; to make them “toe the company line”; to make sure everyone’s “singing from the same song sheet”; or just to tell whatever story is most likely to win.

There’s an old story from the late House Speaker Thomas “Tip” O’Neill: In his first congressional election, he campaigned all over his home town and worked hard, but he found out that his next-door neighbor, an elderly woman, had said she would not vote for him. He went to her house and said, “Mrs. Finley, you’ve known me all my life. I shoveled your driveway, mowed your lawn, delivered your paper, beginning when I was 10 years old. Why aren’t you going to vote for me?”

“Tommy,” she answered, “you never asked me.”

Don’t make that mistake. Ask your witness for the truth, not as an offhand comment or an assumption. Ask for the truth — early, clearly, humbly, passionately and repeatedly.

Do they understand you want all of it, not just the easy stuff? Encourage the client to talk about sometimes difficult matters. Questioning in different types of legal proceedings can often reach into areas that the witness views as private, sensitive, embarrassing or even incriminating.

As a lawyer, you cannot effectively represent your client as a witness if he or she is not fully candid and forthcoming. As a person, you must understand that you are asking someone to say and admit things that he may not have admitted before, sometimes even to himself. That can be a long, hard process that must be handled with patience and feeling.

Lawyer and witness must work together to close the perception gap.

The audience gap

The problem:

Witness: “Why doesn’t he understand?”

Lawyer: “Because he’s not listening!”

The solution:

“Come have a seat at the table!”

“Come talk with us!”

We are social animals, and we treasure invitations to join others.

Your spouse or relative invites you for a meal, your friend invites you for a drink, your co-worker invites you for a meeting. From a very young age, we learn and enjoy being social.

We respond to and interact with those at the table. Maybe they’ll agree with us, maybe they won’t, but we know they will listen. We know whom we are talking to. Our “audience” is clear, right there in front of us. Our mission is to communicate with them, to understand them, and to help them understand us.

But what if the “table” we are invited to is the witness table: a deposition, a hearing or the like? The most common and fundamental mistake many witnesses make is not understanding who the real “audience” is, and that the person asking the questions is often not the principal audience.

What a bizarre gap for a normal, sociable person: The person you are talking to is not actually the audience. Stranger still, in a deposition or some other witness setting, you may be talking through the court reporter to the real audience, which is not even in the room. Indeed, we may not even know yet who it is: some yet-to-be-determined juror, judge, arbitrator or other finder of fact.

This “audience gap” is not the witness’s fault. It’s the lawyer’s fault for not understanding how profound this misunderstanding can be and for not making it clear in preparation.

The gap is truly a wide one. It goes against all our upbringing, our socialization, our normal interactions. The idea that the person asking the questions may not be the person to whom the answers are directed is hard to say and even harder to understand and deal with.

Explain why the questioner is not the audience. They are often paid advocates, hired to win, and unmovable from that advocacy no matter how personable and persuasive the witness may be. It's not a reflection on the witness; it's just the way things work.

Fill in the gap from both sides — first, with an understanding of who the audience really is. Is it Juror No. 6, a judge, an arbitrator? Who are they, what are they like, what are they looking for? Second, the questioner can take advantage of the gap in many ways, including:

- “The Friend” — The questioner pretends to be the witness’s friend to try to get the witness to tell him more and what he wants to hear, or at least try to bend things his way and avoid or minimize any disagreements. He’s not a friend. Make sure your witness doesn’t lose focus.
- “The Interpreter” — He tries to be “helpful” and puts the witness’s testimony in his own words: “So, what you’re really saying is ...”; “Let me see if I can sum this up ...”; “Then, wouldn’t you agree that ...”; etc. This is your witness’s testimony. Don’t let anyone put words in his mouth.
- “The Jerk” — We’ve all met him: the infuriating person who offends you and goads you into an argument. But here, the questioner knows that if a witness is busy arguing, he’s forgetting about — and likely making a poor impression with — the real audience. Don’t let your witness engage the questioner.
- “The Cynic” — How frustrating it is to be at the table with someone who just won’t agree with you no matter what you say. That frustration can cause you to go overboard in making your point, or to just shut down and not bother. But the questioner is not the audience. The witness is not going to change the questioner’s mind (or at least he’ll never admit it). If the witness reacts to the questioner as “the cynic” in any of the normal ways, the questioner knows it’s much harder for the witness to communicate with the real audience.

Close those key gaps.

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