Dealing With Difficult Witnesses: Yours and Theirs

Beatrice O'Donnell
Duane Morris LLP
Philadelphia, PA

Anne Marie Seibel
Bradley Arant Boult Cummings LLP
Birmingham, Alabama

CHALLENGING WITNESSES: BEFORE YOU TAKE THEM OUT TO THE WOODSHED, READ THIS

The term "horse-shedding" or "woodshedding" a witness was coined by the author, James Fenimore Cooper. The phrase originates from the practice of attorneys rehearsing their witnesses in the carriage sheds near the courthouse in White Plains, NY. While the venue of such sessions today is unlikely to be a carriage shed, witness preparation remains a central part of trial practice. In fact, while courtroom dramas focus on adversarial exchanges between a lawyer and a witness, some of the most important exchanges take place outside of the spotlight during witness preparation sessions. Not only must a lawyer prepare a witness effectively, but also ethically.

Further added to the mix of witness preparation are challenging witnesses, such as chronic multi-taskers, technocrats, busy corporate executives, or witnesses who aren't interested in the truth. Study, diligence, and ethical behavior are prerequisites to any such pre-trial session. But, even knowing the material better than your witness isn't enough for trial preparation of a challenging witness. For those examples (and more) consider the following practice pointers:

I. Your witness: Technocrat

A. Identifying characteristics: An accomplished person in a very technical field who lives and breathes the acronyms and techno-speak.

B. Key risks: The witness can't relay important information in a form understandable to the decision-maker.

C. Tips:

1. Explain to the witness that it is her job to translate her expertise into language that is comprehensible. While speaking in technical language may be a mark of expertise within the witness's technical circles, it can create a barrier between the witness and the decision-maker. Only through eliminating any such barrier can the witness advance the case.

2. Take time to explain the education and world experience of the expected audience. For juries, there can be no guarantee that there is any familiarity with the technical issue at hand. And, even for a sophisticated decision-maker, detailed understanding of the law does not necessarily equate with the ability to follow technical testimony.

3. By the time you meet with a witness, you may now be as conversant in techno-speak as your witness. In those instances, resist the temptation to show your own knowledge in the preparation session by permitting the witness to lapse into technical language. Rather, insist on breaking down an explanation into common language and use what you've learned to provide accurate translations.

4. Don't hesitate to bring someone into the room who isn't familiar with the case and test the witness's ability to relay critical information.

II. Your witness: Busy Corporate Representative

A. Identifying characteristics: She believes lawyers only get in the way of business. She is understandably time strapped and views the preparations session only in terms of dollars going out the door.

B. Key risks: Her distaste for litigation and legitimate time pressures make the sessions tense and the preparation limited.

C. Tips:

1. Openly acknowledge the time pressures and show respect for them.

2. Set objectives for your sessions and meet them.

3. Explain your role as one that will permit her to get back to her job.

4. Demonstrate that you understand the business.

5. When a session is productive, don't underestimate the benefit of sharing your genuine appreciation for the executive making time to prepare.

6. Explain to the witness that good, solid preparation may well lessen her actual time testifying and will certainly inure to the benefit of her employer.

III. Your witness: Multi-tasker

A. Identifying characteristics: Eyes always looking down at her phone as she answers e-mails, texts, or plays solitaire while listening with one ear open.

B. Key risks: The witness is present in the room, but not gaining anything from the preparation session. Without sufficient practice at focusing only on the task at hand, the singular focus needed at trial will come as a surprise.

C. Tips:

1. Banish technology – that means for both the lawyer and witness.

2. Bar all interruptions. If a witness is prone to lose direction at every interruption, simply take the interruptions out of play. Post a "do not disturb" sign on the door and instruct team members to hold all questions until breaks.

3. Keep the preparation session moving forward at a deliberate pace.

4. Describe the preparation sessions as endurance training needed for trial.

IV. Your witness: Overconfident expert or fact witness

A. Identifying characteristics: The witness is sure that she can handle any cross examination that comes her way. Plus, she sees no need to review direct examination points other than to prepare you as the questioner. She is just going through the motions without appreciating the risks of the situation.

B. Key risks: Direct examination loses focus and misses key messages and the witness becomes easy prey for a skilled cross-examiner.

C. Tips:

1. Trot out your toughest cross examination questions. Some people prefer to bring in a "bad cop" to do this dirty work. In other words, you may choose to maintain the role of coach and protector of your witness and use another lawyer for mock cross examination.

2. Video sample examination questions to identify spots of weakness. While video practice can be dangerous to use for a novice or nervous witness, it can be useful if the witness needs to be challenged a bit.

3. Be certain to rehearse key parts of direct in a question and answer format. Sometimes, it only seems simple to explain concepts until the witness is actually put on the spot.

V. Your witness: Rambler

A. Identifying characteristics: When you ask him to tell you the time, he tells you how to make the watch.

B. Key risks: He risks volunteering information that is not responsive to questions. Moreover, his muddled presentation may actually hurt rather than advance your case. Or worse, the judge may become impatient with his inability to limit his responses.

C. Tips:

1. Time the witness's answers.

2. Keep a running list of the topics covered in the answer that were unnecessary for the response.

3. Transcribe sample answers and visually mark the limited portions that are responsive.

4. Model the more appropriate question and answer exchanges with a colleague.

5. Don't let the witness ramble even in practice. The witness may insist that he is doing it just for your benefit, but will not do it in court. Without disciplined preparation, however, the witness will inevitably revert to his natural speech.

6. If you are preparing to direct your own witness, plan to lead as much as you can get away with doing. Particularly use this technique in the beginning of an examination when the witness may be nervous and tend to ramble more than usual and when leading is generally permitted to establish basic points.

VI. Your witness: Question-parser

A. Identifying characteristics: He is on the defensive and overanalyzes every question.

B. Key risks: He will look evasive, lose credibility, and in the process fail to deliver the points for which he is testifying.

C. Tips:

1. Come up with a list of the key areas where concessions can't be made. If the witness can become comfortable with responding freely in other areas, he can focus his caution on the true points of contention.

2. Find samples of prior examination by your opponent. Identify trends and help the witness distinguish between tricks and standard questions.

3. Obviously, you want a healthy balance between skepticism and responding. But, focus the witness on listening to the question and answering thoughtfully, instead of always looking for the trick and being nonresponsive.

VII. Your witness: Jokester

A. Identifying characteristics: Whether because of nerves or personality, his tendency is to be flippant in response to questions.

B. Key risks: Decision-makers don't like comedy from witnesses and transcripts do not reveal sarcasm.

C. Tips:

1. Be blunt and firm about the need to keep any light-hearted comments outside of the proceedings. A witness doesn't have to be fully without personality. But, making jokes is simply out of bounds. The gravity of the proceedings doesn't mix with making light of the situation.

2. Not only are jokes out of bounds, but also caution against being too colloquial in expression.

VIII. Your witness: Deer in headlights

A. Identifying characteristics: Intimidated by the litigation process, in general, and the concept of being a witness, specifically.

B. Key risks: Will be too caught up in the anxiety of the moment to be effective on direct or cross.

C. Tips:

1. Make the witness as familiar as possible with the setting for the examination. For example, visit the courtroom or practice examination in a mock courtroom setting.

2. Identify the key "must haves" in the examination, allowing the witness to have a concrete set of tasks for the examination.

3. Practice as much as possible, starting with simply getting comfortable well before advancing to cross examination. If you are going to use technology, demonstratives, or exhibits, practice with them during preparation sessions.

4. Describe your role as a team – it is up to the examiner to help guide the direct examination and help the witness relay key information.

5. Alert the witness that the judge has the right to interrogate the witness so the witness does not react if that occurs.

6. Prepare the witness for the concept of re-direct, making them alert for helpful questions from you when the time comes instead of freezing.

IX. Your witness: Creative Testifier

A. Identifying characteristics: Unable to stick to "just the facts".

B. Key risks: Here, the risk is not only on the witness crossing the line of false testimony, but on the lawyer for knowingly presenting false testimony. As Jim

McElhaney has explained, the ethical line is between developing testimony in order for it to be effective versus suborning perjury. *Trial Notebook* at 108 (2005).

C. Tips:

1. Explain to the witness your obligation as a lawyer to represent your client zealously without offering false testimony, referencing the ABA Model Rules of Professional Conduct, as needed. The lawyer has a dual role: an advocate for the client, but also an officer of the Court.

2. Use prior testimony, witness statements, and documents to demonstrate the errors identified in proposed testimony.

3. Walk through the consequences of false testimony, including not only brutal cross-examination, but the likelihood of significant consequences, such as striking the claims or defenses at the heart of the case. Providing real life examples of courts punishing client and lawyer alike may be persuasive.

4. Ultimately, your ethical obligations may lead you to seek withdrawal from representation.

As this last scenario carries with it significant consequences beyond just direct and cross examination, it warrants further discussion. Virtually all states have adopted the ABA Model Rules of Professional Conduct (formerly Model Rules of Professional Responsibility) to assist their attorneys in the zealous representation of clients while maintaining the integrity of our legal system. At the most basic level, a lawyer may not counsel a client to engage in or assist a client to engage in illegal or fraudulent activity. *Rule 1.2 Scope of Representation and Allocation of Authority between Client and Lawyer*. However, there is a finer line when the lawyer believes that the client intends to give false testimony. If the attorney *knows* that the testimony to be false, the attorney may not offer that testimony and must make every effort to convince the client not to provide such testimony to the court. If the lawyer continues the representation, the lawyer may only offer the accurate portion of the client's testimony. *Rule 3.3(a)(3) Candor to the Tribunal.* However, the Comment on Rule 3.3 indicates that: "A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances." See Rule 1.0 (f). This rule is consistent with the lawyer's obligation as an officer of the Court, not purely an advocate for the client.

If a client or witness offers testimony to the Court either on direct or cross-examination that the lawyer knows to be false, that attorney is obligated to take action. An attorney is required to counsel her client to assist in correcting the erroneous testimony provided. If that cooperation cannot be obtained, the lawyer must take further remedial action including withdrawal from the representation or, under certain circumstances, making the disclosure to the Court. If withdrawal of the representation is not permitted or would not remedy the situation, an attorney may need to take the extreme step of making a revelation of attorney client privileged information to the Court. *Comment on Rule 3.3.*

While creating or permitting false testimony is well beyond the ethical rules, where is the line to distinguish between client preparation and client coaching? A recent ruling by Judge Lucy Koh during the hard fought patent case of Apple Inc. v. Samsung Electronics Co., Ltd. et al provides an example. Judge Lucy Koh struck a portion of the testimony provided by Samsung expert, Kevin Jaffay, in contradiction to his report. Attorneys for Samsung were accused by Judge Koh of "prepping" the witness to provide convenient testimony not contained in his original report relating to Jaffay's opinion on the construction of one of Apple's patents. The judge reportedly

sent the jury out of the courtroom and stated: “I’m going to strike what he said. I think that he was primed to say that, and that’s improper.”

If an attorney learns of false testimony or invented evidence, the attorney’s obligation remains until a final judgment has been entered or the appeal period has expired. In the recent trade secrets case of LBDS Holding Co. LLC v. ISOL Technology Inc. et al., 6:11-cv-00428, U.S. District Court for the Eastern District of Texas, Akin Gump sought to withdraw from their representation of LBDS Holding Co. LLC after securing the client a nearly $25 Million verdict. After the verdict, ISOL Technology Inc. prepared a motion for sanctions for perjury and falsification of evidence alleging that a key document, a supply contract, and a number of emails were fabrications. The emails were purportedly from clients and were created to substantiate LBDS Holdings Co. LLC lost profits claim against ISOL Technology Inc. U.S. District Judge Leonard Davis granted the motion of Akin Gump based upon the ethics rules.

Any one of the above witness types could be the one to test the fine ethical line between zealously representing your client and meeting your ethical obligations under the Model Rules of Professional Conduct. Coaching amounts to telling the story to the witness while preparing is working with the client’s story. Witness preparation cannot be too suggestive or inconsistent with the actual events at issue. While an attorney cannot create false testimony, it is the lawyer’s responsibility to present his client’s case in the light most favorable to the client. At its core that requires skillful preparation for a witness to fully and accurately respond to questions.