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Your Witnesses Have Power. Are They Using It?

By Matt Keenan

Will your witnesses fall victim to the barrage of questions designed to make them look bad, or will you help them to find and use their voice tactfully?

For witnesses getting ready for a deposition, I developed a simple roadmap to use with each one. It goes like this:

PLEASE.
- **P**repare
- **L**isten
- **E**xercise control
- **A**ccept the obvious
- **S**tay in your area
- **E**motion is OK

Of late, it seems the most important asset for witnesses is the first "E"—exercising control. The following article will explain why and how.

How We Got Here

Document management systems have replaced witnesses as the storytellers. These systems, which track, manage, and store documents, not only document the decisions and the rationale for those decisions, but when matched with contemporaneous emails, serve as the editorial content to those same decisions. Whether it's design history files, regulatory submissions, clinical trial documents, or post-marketing safety surveillance, these document management systems allow outsiders to connect the dots on decisions made many years earlier.

This reality has shifted the focus of witness depositions into something new and far more nefarious—using the opportunity to push confirming narratives. Open-ended questions, like "tell me what happened," went the way of the dodo bird, replaced by reptilian themes and stock questions vetted by the plaintiff's steering committee and asked of every witness. And with the sharply directed content, questions are paired with an accusatory tone that appears lifted from a Hollywood screenwriter's playbook.

For many witnesses, this new reality means that depositions today are less a search for the truth and more of a firing line. Questions are shifting from leading to argumentative. Court-imposed limits on depositions, which are commonly seven hours, add to the pressure to score sound bites. Counsel feels the need to create jury-friendly clips of witnesses cast in a bad light.

The limited attention span of jurors contributes to this sound bite-driven nature of depositions. Plaintiffs' attorneys look to tell their story in two minutes or less and make an impression with their jurors that jumps off the screen. The net effect is to force attorneys to condense their case and infuse it with pop and sizzle.

Juxtaposed against these realities, courts have tied the hands of the defense to objections to form.

The simple reality is that witnesses have to protect themselves. And they have the ability to do just that, provided you teach them to use it.

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The Six Most Important Words: "May I Please Finish My Answer?"

Witnesses are allowed to finish their answers. Indeed, they are obligated to do so, as they are sworn to be truthful. Yet, interrupting witnesses is one of the most common things I see now. Plaintiffs' counsel, it seems, is simply taking its cue from the public at large. Stopping conversations, particularly by men of women, is becoming commonplace.

> **Despite all the changes** in the world of litigation, it is fair to say that one thing remains the same: people do not like bullies. Plaintiffs' counsel with a penchant to cut off witnesses will see their goodwill diminish.

In two Democratic primary presidential debates last summer, for instance, the candidates interrupted each other seventy-one times, most often men over women. In the first presidential debate, according to one news outlet, President Trump interrupted then-Democratic nominee Joe Biden 128 times. In the second debate, there were fifty-one interruptions, with President Trump interrupting twice as many times as Joe Biden. In Supreme Court arguments, among the justices, there is significant gender disparity in both interruptions and time used for questions. You probably don't need me to tell you who gets the short end of the time.

Attorneys may think they are compensated for barging into the conversation, creating an incentive to interrupt. The more aggressive, the more rewarded. Experts note that men not only talk more, they are often louder. Further, what compounds this trend is that often the most important of any witness's answer is the finale—i.e., getting to the point.

Compounding the situation, the court reporter cannot record two people talking at once. The attorney knows this. The witness doesn't. And when the court reporter pleads for support, the witness feels badly. Furthermore, the deposition process does not lend itself to empowerment. Witnesses feel at the mercy of the process. They are often selected, if not compelled, to appear. They are told what to bring, and when and where to appear.

I handle this in three ways.

First, I explain that they will be interrupted; often I give them illustrations and often from other cases I have handled.

Second, I walk my witnesses through the importance of finishing their answer. This goes against the grain for most witnesses who may feel deferential to the questioner.

Third, if the attorney cuts them off, they should use their judgment and invoke the "may I finish" rejoinder. This can take some preparation. It is not an invitation to argument. They need guardrails. But they can and often should insist on completing their answer.

Be Careful of the Optics

Witnesses must balance the importance of finishing their answer with the risk of creating bad optics that may hurt their position. Beth Devlin, an experienced jury consultant and founding partner of EDGE Litigation Consulting LLC, has seen it all. She strikes this note of caution.

"Yes, interrupting is obnoxious for a lawyer to do. Nevertheless, more importantly, if the witness chooses to fight back or get into a debate with the lawyer, that *strategy will always backfire on the witness*." Jurors give lawyers some latitude to be obnoxious (they expect that to some degree when dealing with an adverse witness). However, they do not expect this of witnesses; and when witnesses act this way, they wind up looking defensive with jurors and lose credibility. Ms. Devlin adds,

> It is especially hard for a witness to maintain a cool and calm demeanor over the course of a deposition, but that's when it's more important than ever as that is when the opposing counsel is looking for a 'gotcha' moment when the witness is beginning to grow weary after hours of testimony. However, the power to the witness comes when the witness completely does not engage with the behavior of that lawyer. In other words, if a lawyer is acting like a bully and the witness simply maintains a cool head and answers in a straightforward, earnest and polite manner, the disparity will be apparent and jurors will be more inclined to see the bullying behavior for what it is. The key for the witness is (1) know that the lawyer might use it as a tactic; but, *critically*, (2) do not engage in that tactic.

Still, Witnesses Have Power and Should Use It

Even when not interrupted, witnesses cannot be compelled to answer questions that are wrong, nonsensical, or silly. Yes, to be sure, the first line of defense is for counsel to protect the witness and, if necessary, to seek judicial assistance. In this increasing era of Zoom depositions, judges can join a deposition and watch not only the witness but plaintiffs' counsel, as well. Without question, that option is most desirable.

Still, bad questions come in many shapes and sizes, and many can and should be deflected by disclaiming expertise, personal knowledge or, in many cases, because the document predates their employment. Ms. Devlin recommends a firm but polite "that's not correct" or "I disagree" and throw (nicely) the ball back across the table. "Sometimes, less is more, and a pithy response can be powerful for a witness."

It is my experience, however, that witnesses, particularly experts, can reshape questions to achieve the desired information while allowing everyone to move on. Illustrations of rejoinders that witnesses have used include the following:

"I like to use my own terminology and would say it this way…"

"I can't answer that yes or no for these reasons…"

"I shouldn't speculate and so I would just say I don't know."

"That was not my responsibility at the company."

"I don't think it's fair to put on the witness's shoulders the burden of reshaping the questions," Ms. Devlin adds.

Putting witnesses in that position can be stressful and take away from their ability to do their main job, which is LISTEN to

the question being asked, THINK internally about the best way to answer that question, and then ANSWER in a way that is clear, complete and concise, and also in a non-aggressive but assertive and confident tone. In my opinion, attempts to "fix" the question in the answer often can serve as a way of helping the opposing counsel, because it gives the opposing counsel a "read" into how that witness is thinking about the issue, particularly when that witness is an expert.

How counsel handle this issue may depend on the confidence of the witness and his or her experience with the process.

The Silver Lining

Despite all the changes in the world of litigation, it is fair to say that one thing remains the same: people do not like bullies. Plaintiffs' counsel with a penchant to cut off witnesses will see their goodwill diminish. Yes, as Beth Devlin notes, plaintiffs' counsel receive a longer leash than do corporate witnesses. However, defense counsel, whose client may be portrayed as the bad guy in the courtroom, may welcome the notion that maybe there is someone else who might be the villain.

In any event, one thing is an absolute certainty—the era of obtaining sworn testimony for the purpose of just understanding the facts of the case is long gone. Counsel, and their witnesses, should be prepared for this new reality.