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Making your client a stellar witness: A step-by-step guide to deposition witness preparation

Preparing witnesses for deposition isn't just a vocation with me, it has been a calling for decades, over hundreds of trials and thousands of witnesses. I know that after absorbing these 10 steps that you, no matter whether you have prepared hundreds of witnesses or none, will be on your way to being better at it. Furthermore, your client will be the best possible witness he or she can be at deposition. And, who doesn't deserve that?

Identify the witness type

There are two kinds of witnesses in a deposition preparation session. Not *expert* and *lay*, but instead: *inexperienced* and *experienced*

The *inexperienced* witness has never been deposed and has never been in court. I like them.

No bad habits. No rotten, lousy witness preparation by bad attorneys. No being thrown to the lions with no preparation. No save a trip with an attorney in an elevator on the way up to the deposition room. No nightmare experiences in the deposition room which cause deposition PTSD. No outlandish fantasies of having won a case by themselves, single-handedly, with their own unique brand of brilliance.

And then there are the *experienced* witnesses.

Identify the attorney type – counselor, know thyself

There are two kinds of attorneys when it comes to preparing a client for deposition: *talkers* and *doers*. I know. I've been a trial consultant for 31 years, and I've been in the room with both kinds.

Talkers generally start at least three sentences with the following, "When I prepare witnesses, I always tell them..." *Talkers* love to lecture. They believe that, unless it comes out of their mouths and is exactly the script, the sky may fall down.

Doers spend at least 25 percent of any preparation session role-playing. They actually allow the witness to try out what deposition is going to be like by playing the role of the *deponator*, a word I coined to refer to the attorney who takes a deposition – feel free to use it with your witnesses!

There are some things in this world, like the history of 16th century French poetry, that are best learned through being talked to or lectured about them. There are others, like having your deposition taken, that are best learned through doing. Doing activities are best learned through doing. Think about it – would you rather have the lifeguard, who got an A on the written test but never swam a stroke, dive in to rescue you if you were drowning, or the lifeguard who never read the book but who swims like a fish and has done so for years?

If you identified yourself as a *talker*, it is time to transform yourself into a *doer*. If you have identified yourself as a *doer*, it is time to up your talking/doing ratio to at least 50 percent doing.

Abandon your "magic list," all ye who hope to enter here

A "magic list" is a lecture about depositions that an attorney believes possesses supernatural qualities because it is filled with the attorney's wisdom. *Talkers* believe that by sprinkling their words of wisdom on the head of the client, that information will be miraculously absorbed into the brain, rendering the client perfect. I have yet to run into an attorney who doesn't have one – even the best *doer* can't help but wax poetic when it comes to their particular list of rules and regulations. The magic list I often hear goes something like this, from the witness's point of view:

"We are now getting ready for your deposition. A deposition is a...blah blah blah...don't answer if you don't under-

stand the...blah blah blah...take your time before answering the...blah blah blah... for God's sake don't volunteer... blah blah blah...if you don't know, if you don't remember just...blah blah blah...one time I had a witness who didn't listen to me – of course, he is dead now and his wife is in a mental hospital and his children are on welfare...blah blah blah...don't worry, I'll be right beside you the whole time."

If at this point in the reading you are thinking to yourself, "but I always" or "but I must" or "what – do you want me to lose my license?" do not despair. There are, indeed, many rules and regulations that govern the taking of a deposition. However, they can't be learned in a vacuum. Remember how you learned how to play baseball or soccer when you were a kid? By sitting on the sidelines and praying you'd never get put in? (Wait – no – that was my personal sports career).

As on the soccer or baseball field, rules and regulations are much better taught in the context of the game – the rehearsal game.

Prepare to play the rehearsal game

At this point you may be thinking, "Sure, I do role-playing a little at the end of the session, why should I change?" For example, what about all that useful advice gleaned over years of practice and handed down from one generation of attorneys to another like burnished golden truth? Advice is meaningless unless the person needs that advice.

In the *blah blah* magic list lecture you can say, "Think before you answer." Of course, not only are you teaching in a vacuum for the witness, but also for yourself, since you don't know how the person testifies. But what if the person already thinks before answering? Or what if the person thinks they think before answer-

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ing? Or what if the person has no idea of how to think before answering because the person has never thought before answering a question in their entire lifetime? What good does it do any of these people to hear this piece of burnished gold in a vacuum? None.

Next we come to filling the witness's head with answers to non-existent questions in the attorney's words. There is very little I have experienced that is more painful than a car wreck victim with a high school education attempting to repeat, "It is my custom and practice to turn on my signal while approaching an intersection," as if going over a Bible verse that is going to get him a Good Conduct Medal from the bishop. Answers outside of a rehearsal context are meaningless. A person has to experience hearing the question and answering it — perhaps imperfectly, but perhaps in a way that is 80 million times better than the pre-planned attorney answer. This is question and answer in context, not in a magic list vacuum.

So instead of polishing your magic list, polish your list of questions you believe that the deponator is going to ask your client.

Allow plenty of time

Make sure the time you have scheduled to meet is two hours at the minimum, four hours ideally. Make sure the date on the calendar is ideally one month before, at minimum two weeks before, the date of the deposition. This allows you maximum time to learn the most important things you need to get out of this session:

- How does this person learn best?
- Once I know how this person learns best, how quickly does this person absorb what needs to be learned for the deposition?
- How much more time and how many more sessions is it going to take for this person to learn all the information between now and our final witness preparation session which is scheduled 24- to 48-hours before the date of the deposition?
- Can I handle this on my own, or do I need the help of a trial consultant to prepare this witness? Because I think oth-

erwise defending this deposition is going to be like a white knuckle ride on the roller coaster for me.

Time is so important. So many attorneys wait much too late in the game to work with a witness. Many don't allow enough time before the deposition is to be taken. And then there is the matter of only scheduling an hour or so with the client when so much more time is needed for the witness to be successful. We all know that the more successful the deposition, the more likely the settlement will be in your favor. We all know that the more successful the deposition, the better the deposition transcript will be. A good transcript means that trial doesn't become a clean-up job over something (or many things) that should never have been in the deposition transcript to begin with.

Make your rehearsal space "lifelike"

Make sure that you have a chair and table that approximate (if the deposition is taking place in another office) or actually are (if the deposition is taking place in your office) the table and chair the witness will be using at the deposition.

Make sure the camera is set up across from the witness, behind the head of the examiner. Remember, even if this deposition isn't going to be videotaped at the deposition itself, the camera is an invaluable learning tool for deposition preparation.

Make sure that the room you are going to use for witness preparation is a comfortable temperature. If you are untrustworthy in this area, ask someone who knows better than you do. For example, if you are a man whose wife constantly says to him when accompanying him on a car ride, "You can't possibly be opening the window right now. Are you insane?" and this witness is female, you might very well be untrustworthy in this area.

Make sure there is water, coffee, juice, soda-pop. Make sure that the bathroom key is working, not lost, etc.

Make sure that there is a box of tissues.

To the extent that you can, you want to make the witness feel physically at ease, both during the deposition preparation and the deposition itself.

Identify the kind of learner your witness is

Greet the witness. Invite the witness to sit down. Then, without further ado, say something along the following line: "Do you have any questions or concerns or thoughts or fears about having your deposition taken?" Through the expression of the person's concerns, you will discover the learning style of your client, and you will know where to start the learning process for this witness. They fall generally into four categories of learners.

Before we examine these answers and what they tell you about which of the four learners this witness is, a word of caution. There is a very good chance that in every first preparation session of every witness almost all of these will be covered at one point or another in that session. What the answers do is show you where to begin. If you don't begin the learning process at the point where the witness needs to begin, a much lower percentage of information will stick in the witness's brain. Ultimately it will take you *more* rather than *less* time to get them where they need to be. The fact that it is always different, never the same, from the last witness you prepared for deposition is something to be embraced and celebrated. It is the death of the word *always* in your deposition preparation vocabulary (as in, "I *always* start by blah blah blah").

Now, let's examine those answers and what they mean.

• **The Emotional Learner:** "I am scared that he is going to make me say something that isn't true and I'll tank the case."

This person's first concerns are emotional. Other examples are "Is the defendant going to be there?" and "Is the lawyer taking the deposition mean?" You must start this witness's learning process with emotional reassurance. Answer the question truthfully and then ask, "Anything else?"

• **The Factual Learner:** "I wish I hadn't put that I graduated from college on that resume."

This person needs to start with reassurance about the substance and content

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of the case. Other examples are, “Does the contract say 1979?” and “I reread the letter you sent me and someone misspelled my mother’s name.” It is tempting to pour out everything about the substance in the case all at once. Again, just answer the one question and then ask, “Anything else?”

• **The Practical Learner:** “Is this the room? Is this what the room is going to look like?”

This witness needs you to start out with the agenda, the room setup, or something physical. Other examples are, “How long is this going to take?” and “What is the schedule for the day?” and “Where am I supposed to sit?” Again, just answer the one question and then ask, “Anything else?”

• **The Creative Learner:** “I don’t see why this deposition is scheduled for a whole day. What questions can they possibly ask that could take a whole day?”

This witness needs to believe that you are making up a unique set of witness instructions just for that person. This person is the kind of learner who only learns when they make something new – very creative types. This person is more likely than not someone who will volunteer like crazy. This person envisions a deposition consisting of an attorney from the other side simply saying, “Just tell me all about it” followed by 15 minutes – 30 tops – of the witness blabbing on about the case. Answer the concern by telling the person that you will help them be in charge in the room in a very special way and that you are going to teach them a system that will allow the deposition to take as little time as possible. Then, just say, “Anything else?”

In addition to the learning styles, you may run into some answers that alert you to “issues.” For example, “I’m not afraid of some lawyer, if that’s what you mean,” indicates you have a fighter on your hands.

Or, “Afraid? I’m looking forward to this! I can’t wait!” indicates you have a crazy person on your hands.

Also, if you have a person who is “experienced,” that is, has had their deposition taken before, ask something along the lines of, “Tell me, what is the good news and the bad news for you about getting your deposition taken? In other

words, what do you think you were very good at and what do you think didn’t go as well for you?” Listen, listen, listen to the bad advice, poor preparation by your predecessor, nightmare situation, overconfidence of this client. Keep these nuggets of information in your head – you will need them for teaching and reassuring purposes during the rehearsal process.

At this point in the process, you at the very least have identified the way this particular client learns best (Emotionally, Factually, Practically or Creatively). You have also answered all the “Anything else?” questions. You are now ready to begin.

Start rehearsing!

Turn on the camera. Put on your costume as you play the role of the *deponator*. Start questioning.

You may not realize that you need a costume to play the *deponator*. But you do. That way you can ask questions “in role” as opposing counsel and give advice as yourself and the witness will actually know who you are. Ever had a witness say to you, “Wait a minute – are you being my lawyer or the other lawyer?” I have developed hats for this purpose that all the attorneys with whom I work have the opportunity to use: A black hat for the “bad lawyer” and a white hat for the “good lawyer.” You don’t have to buy my hats, but you do need to find a creative way to allow the witness to know what role you are playing at any given moment in rehearsal.

Question for 10 minutes in your *deponator* costume. Stop. Change your costume back to you. Play back and discuss with the witness what you are both seeing. Keep doing this over and over, subject by subject. Start with 10-minute stretches. Build up stamina with your client so that the sessions get longer and actually simulate the amount of time that will be spent at any sitting.

And...revel in the fact that all the wisdom you have gotten from your years of experience and the experience of others – formerly known as your magic list – is being covered point by point in your preparation either as praise, “I usually have to tell witnesses to slow

down, but you already do that perfectly!” or as helpful hints, “Do you hear that extra word I threw in there, now that you get another chance to hear the question?”

Also make sure that your witness understands “The Forms.”

Teach your witness “The Forms”

“The Forms” is a concept developed by Dr. Martin Peterson, a trial consultant from Lincoln, Nebraska. There are two: *Analyzing the Question* and *Physical*.

Analyzing The Question involves the witness taking the question asked by the opposing counsel in the deposition and putting it through a series of steps in order to come out with the correct answer.

The steps are:

(1) Do I understand the question?

(If the witness does not, all the witness says is, “I don’t know what you are asking me.” If the witness does understand the question, move on to step 2.)

(2) Do I know the answer to the question?

(If the witness does not know the answer to the question, all the witness says is, “I don’t know.” If the witness does, move on to step 3.)

(3) Do I remember the answer to the question?

(If the witness does not, all the witness says is, “I can’t remember right now.” If the witness does remember the answer to the question, move on to step 4.)

(4) How do I want to answer the question?

(The witness thinks silently through the answer and then answers out loud.)

Why these four steps in this order?

(1) Do I understand the question?

The first question, “Do I understand the question?” has the witness think through many issues which make a question good or bad. The idea is to never answer a bad question – that is, a poorly phrased or misleading question. Therefore, you get rid of all the bad ones immediately with the phrase: “I don’t understand what you’re asking me.” The following is a partial list of how this first question is used by witnesses:

• Does the witness understand all the literal words of the question?

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Example: Where were you prior to accepting the terms of the agreement?

- Does the witness understand the concept of the question?

Example: How do you make one of those?

- Is there something inherently wrong with the question?

Example: How old is your son? (The witness only has a daughter.)

- Is the question too broad?

Example: What did you do in 1991?

- Is the question compound?

Example: Where and when did you meet?

Almost everyone can use “Do I understand the question?” as the first step. However, this first question can be adapted if the witness has a particular idiosyncrasy in learning, listening or processing. For example, I’ve used the phrase, “What is the question?” instead of, “Do I understand the question?” for people who don’t listen all the way through the question. I’ve used the phrase, “What is he asking me?” for other casual listeners.

(2) Do I know the answer to the question?

Once the witness understands the question that is asked, the witness has to have the knowledge to answer the question. To illustrate this concept, I often ask the witness, “What kind of china should the White House serve dinner on tonight?” Most everyone gets that they don’t know what the choices of china in the White House are, so they don’t know the answer to the question.

This step keeps witnesses from answering questions that they do not know anything about.

(3) Do I remember the answer to the question?

The witness understands, the witness knows, now does the witness remember? Depositions are filled with witnesses who guess at what they do not remember because they believe that they should remember even when they don’t.

This step allows them to say, “I don’t remember right now” when they don’t remember. I sometimes illustrate this one by asking, “What was the kid who sat behind you in the third grade wearing on

the first day of school?” This works brilliantly for anyone who didn’t attend Catholic school with uniforms. I then can illustrate having a memory refreshed by saying, “Now, if I showed you a snapshot taken of your third-grade class the first day of school, you might look at the kid sitting behind you and absolutely remember what he was wearing the first day. Or the picture might not do anything to jog your memory. That’s just fine.”

(4) How do I want to answer the question?

In this step, the witness thinks through and answers the entire question silently before speaking the answer aloud. This keeps the answer short, sweet, succinct and to the point. This cuts down on volunteering almost completely.

This keeps *yes* or *no* questions being answered *yes* or *no* without elaboration. This allows damages questions to be answered fully because the answer is responsive to the question, “How has your life been affected by what happened to you?”

There are many other benefits to the Analyze the Question Form. The attorney has time to think. The attorney has time to make an objection on the record. The witness sets the pace of the deposition since it takes time to go through the questions. The witness is able to remain rational instead of flying off the handle because she is able to think first and speak second. The deposition is much more likely to remain under the control of the witness than under the thumb of the attorney.

Sometimes a particular witness needs a variation of Analyzing the Question. There are easily as many variations on The Form as there are learning differences. I have had people who are purely visual and don’t read, think through the questions as images, rather than as words. With a black marker on a page of butcher block I have created chaos for *understand*; a box of knowledge for *know*; an open book with a blank page for *remember*; and a set of three stepping stones for *how to answer*. I have added a fifth question from time to time, such as, “What does my gut say?” for someone who doubts the answer which comes to mind when that answer is invariably correct.

The Physical Form helps you teach your witness what to do physically in the room. Except in cases where it isn’t physically possible due to injury, I like them sitting up. I like them with their hands on the table clasped lightly. I like them leaning forward in an attitude of “I can’t wait to answer questions”.

But there is so much more to The Physical Form than how to sit.

I generally have the witness look at the mouth or necktie or hollow of the throat of the *deponator*. This rids the witness of any of the burden of making eye contact with the opposing counsel. The witness won’t try to please, fight with, or follow the opposing counsel because there is no opposing counsel. There is just a necktie or a set of pearls and a bunch of words to be thought through with the Analyzing the Question Form.

When the witness has the answer to the question (“I don’t understand” or “I don’t know” or “I don’t remember right now” or “1979”), the witness turns to the court reporter (transcript-only deposition) or the camera (videotaped deposition) and gives the answer.

Then, when the witness is ready for the next question, the witness’s eyes go back to the knot of the tie or hollow of throat or mouth of the opposing counsel.

The Physical Form has many, many benefits. *The Physical Form* takes the deposition out of the hands of opposing counsel. It prepares your client for testifying in court where instead of testifying to the camera or the court reporter, the witness will be testifying to the jurors. It allows the witness to take care of the court reporter (great instruction for transcript-only deposition) or talk to someone they love (great instruction to get great demeanor for videotaped deposition). This allows the witness to have the kind of great demeanor that has court reporters saying during breaks, “I love her! I just love her!” about your client.

Wardrobe must be shown to you before deposition

Your concept of sweater set and her concept of sweater set might be totally different. You are thinking “school girl” and

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she is thinking “Britney Spears.” I have a lot of opinions about wardrobe which I won’t go into here. I go into great detail about this in Plaintiff Magazine which you can read online at www.plaintiffmagazine.com in an article called *Costuming in the Courtroom*.

Conclusion

The advice I have given you takes time and practice to learn and assimilate.

Why should your clients be the only ones learning through doing? But once you follow and truly master these 10 steps, your clients will become the witnesses you deserve. But more importantly, your clients will have the attorney that they deserve.

Katherine James is an actress and one of the founders of ACT of COMMUNICATION, a trial consulting firm which has brought state-

of-the-art trial communication skills to more than 20,000 attorneys and witnesses. For 30 years, she has been teaching lawyers how to tell their clients’ stories effectively in trial.

