Witness Preparation: Hidden False Assumptions, Real Truths, Recommendations (Part Three)

by David Illig

In Parts One and Two of this series (see the May 2008 and July 2008 issues of *The Jury Expert*) I taught that litigation has many assumptions about testifying and witness preparation. Those assumptions are false but do not operate at full awareness.

In part Three, I continue with additional assumptions and interventions to allow you to more effectively prepare your clients and witnesses. Remember that these false assumptions are operating even when we think they are not.

False Assumption 5) Witnesses know their actual audience.

Witnesses usually speak to the questioning attorney and assume that is the appropriate audience. The attorney is almost never the real audience -- not in trial and not in deposition. Most attorneys don't tell witnesses that the attorney asking the questions is not the real audience, or more importantly who the real audience ought to be. You can.

Most witnesses give absolutely no thought to the real audience and how their messages should be adjusted to fit the audience. Jurors will sometimes say afterwards; "Why was he acting so mad at us? We're not suing him. Or we didn't hurt him." And the REAL audience is of course the JURY. They don't know, but want and need to know the truth.

The attorneys probably already know the answers to all of the questions. They are basically pretending to ask questions. They pretend they don't know and the witness pretends to provide answers: It's a pretend communication. Real communication between the witness and the jury is available and is critical to effective witness performance.

For trial, I generally recommend that you teach the witness to get the question from the attorney (you or the opposition) and give their answers to the jury by looking at them and talking with the jury. I want the witness to interact with the jury and connect with them. The witness really doesn't have anything to say to the attorney.

Sometimes there are exceptions to this and a few witnesses just don't do well when looking at the jury no matter the training. The vast majority should look and talk to the jury. It is difficult and takes training and practice. You need to assess before trial whether they can do it.

A corollary to this false assumption is that witnesses realize that their real audience at deposition is the jury.

The product of the deposition is a book with the witness's name on the cover. The most important reader is the jury. Yes, the witness must answer the questions. But they must communicate and write their book to the jury (or an expert) as they answer the questions. The real audience at deposition is the same as the real audience at trial, the jury. Most witnesses "act" as if the deposition is actually the possession of the opposing attorney and concede control of the deposition. Interrogating Attorneys are taught to take control of the deposition. But it is still the witness's name on the book cover. Teach the witness that it is their deposition and they are writing the book for the true audience, most commonly the jury (or expert).

What You Should Do to Deal with This Assumption: Teach your witness about the actual audience. Teach your witness to prepare their answers to match the real audience. Most answers are things that we like to say, or usually say. Most are not messages custom-designed to have specific impact on our real audience. You want to teach your witness to shape their messages to the jury. What words do they understand? What experiences of the jury are similar to the experiences of the witness?

TEACH YOUR WITNESS TO TAKE CARE OF THE JURY

First, teach your witness to take the time to consider the needs of the jury. Teach your witness to match everything to the real audience: Vocal tone, attitude, and word choice. Teach them to remain calm and keep a positive attitude. Many interrogators are mean and nasty in order to bring out a damaging attitude and tone from the witness. An angry witness can learn not to show their anger on the outside. Teach them to imagine the jury is sitting right behind the interrogating attorney even if it means having them imagine the jurors are little people sitting on the shoulders and head of the interrogating attorney.

Teach them to use a voice that is appropriate for talking to a neutral group of people who are curious about what happened to the witness. The "tone" of voice, and the attitude are very different than those that would typically be used in talking to an attorney. Interrogation school teaches the attorney that it is often wise to get the witness irritated, impatient, angry, et cetera. These reactions do not fit the jury. Why would you grump or be angry or frustrated with the jury? Your witness can talk about these negative emotions, but should rarely exhibit them in deposition.

Teach your witness to edit her answers slightly to better fit the jury audience. Teach her to think about what the audience needs to first understand, and then to believe her testimony.

False Assumption 6) Deposition testimony requires less preparation than trial testimony.

Too many attorneys believe deposition testimony is less important than trial testimony. They believe it is less difficult and less important. Depositions are extremely important in litigation which doesn't end up at trial and, as most of us know, about 95% of cases don't go to trial. Depositions are critical in the quality of settlements or summary judgments. They can make a large difference in mediation.

However, most witnesses are not prepared very well [or at all] for deposition. The assumption is that witness preparation will happen at trial. But cleaning up the messes of deposition can often be difficult, impossible, or begin too late to be successful. Or there is never the opportunity to clean them up. Preparing your witness extensively for deposition can be one of the most cost effective investments you can make for your client.

What You Should Do to Deal with This Assumption: Put your important witnesses through deposition training. This combines a simulation of the deposition and teaching them new communication behaviors. Use the content of the case to practice the new behaviors and to cover the important issues of the case. You will almost always learn new case facts even though you are supposedly only preparing the witness about what you already know. It's a very efficient way to work up your case.

The witness learns and practices more effective communication while you learn more about your case and your witness. Use video all the time. Give your client homework to practice new communications on non-legal issues.

False Assumption 7) A witness's first duty is to answer the attorney's question.

This is a powerful and influential false assumption.

The **FIRST** obligation of a witness at deposition, cross examination, or direct is to get some portion of their truth across to the audience and not leave distortions, errors, or miscommunication.

The **SECOND** obligation is to answer the question. The order is crucial. One sequence puts the interrogator more in charge, while the other puts the witness more in charge of their testimony.

The question asked by the attorney does need to be answered. But it can be answered with a communication that communicates the witness's truth. It's surprising how often JUST answering the question actually results in serious miscommunications with the jury and does not get the truth across. It gets something other than the truth across.

What You Should Do to Deal with This Assumption: The obvious intervention is to teach your witness the correct order of priority. Some witnesses will want to overdo it. They will appear to be avoiding the question. This hurts their credibility. You can teach them to do both steps with practice so they are BOTH answering the question and communicating a part of their truth.

How? You can teach them to use short powerful answers that say more than yes, or no but still satisfy a judge and jury about answering the question. Teach them to use more specific answers. A full sentence is more specific than a single word. By teaching your witness to make this change in sequence, they will be more active and exert more control in their own testimony.

You can also teach your witness that the deposing attorney is there in hopes of creating a document or part of a document that communicates the truth of his/her side, not the truth of the witness. The witness must exert effort to get their truth across despite the influence and goals of the interrogator. Witnesses often act as if the opposition attorney is there as a neutral party just looking for the truth. Teach your witness that it's not the opposition attorney's job to be neutral. He's supposed to be pushing his truth, not theirs. He's just doing his job by distorting things in his direction. Teach that it's the job of the witness to actively fight for their truth with the jury. They can be pleasant, but persistent.

False Assumption 8) "Normal" or "typical" verbal and nonverbal communication is critical to a witness's success.

Interrogation, as experienced in trial or in deposition, is abnormal. Therefore, normal response patterns are often not sufficient or persuasive. Trying to act and appear normal is overrated in unusual settings. Being effective is much more important than appearing normal.

Looking normal does not overcome ineffectiveness in such areas as listening and saying what you mean. You actually want the witness to give up looking totally "normal". The jury quickly understands that this isn't a normal communication and the witness should be different. You don't get across a minefield by acting normal.

The witness needs permission from you. They need you to teach them that some unusual patterns are needed and acceptable. Ironically, the "strange" behaviors we're talking about are simply very careful listening, very careful crafting of answers, and very careful thinking.

Here is an effective example you can use:

> ***"What are the 'natural' responses to 'attack,'....***
>
> ***Well, there are three 'natural responses': Attack the attacker. Run away. Freeze……***

Those are the three "natural" responses. Interrogation during deposition or cross is actually an attack. However, those are never the ideal responses from a witness during interrogation. But that is where your body and brain go to instantaneously. So you will have to give up the idea of doing what's natural.

You're going to have to learn many 'unnatural' acts. Getting the truth across will often require actions and attitudes that go against the natural currents and pressures existing during the interrogation."

A corollary to this false assumption is the false assumption that it is very important to keep up with the fast pace of attorneys and answering quickly is the best way to get the truth across.

SPEED is one of the major ingredients of the Interrogation Effect and the most common and powerful single tool of interrogation used against witnesses. Excess speed damages more witnesses than almost any other single factor.

These interrogations are VERY, VERY dangerous and are best navigated VERY SLOWLY and VERY CAREFULLY. It's a minefield and the jury quickly understands that moving slowly is good. Going slow takes training. Practice can make it seem more acceptable. **Listening and thinking and creating powerful truthful responses takes time**.

Teach your witnesses that going slow is necessary. Slow is difficult and takes training and practice. Accurate listening and careful, safe, truthful answers that correctly impact the jury are so much more important than going fast. A witness can't do the special listening and crafting answers we're talking about at normal speed.

Ironically, most attorneys are addicted to speed. And most attorneys seem phobic to slow. Attorneys usually have to go very fast in their work and are dealing with other attorneys who go very fast. Many attorneys cannot go as slowly as

their witnesses should go. Even witnesses assume they can go much faster than what is safe. **In general, only very slow is safe.**

False Assumption 9) Practice and preparation inhibits effective witness behavior. And related False Corollaries: "Spontaneous" communications are typically closer to the truth and communicate more effectively than carefully prepared and practiced communications. And Spontaneous Communicators communicate the truth more effectively than trained and practiced communicators.

It's hard to believe but this is a very active false assumption. What sports coach believes this? What musician believes this? What speechmaker? Name one other communication-oriented field that believes this for a second. Even musicians, comedians, or actors who improvise spend endless hours practicing the process of improvisation.

Specific answers usually don't need to be practiced over and over. Witnesses **should not memorize** specific responses except very rarely. What is practiced is getting the truth out, no matter what the interrogator does or attempts to do. No matter what the interference is, the witness should be equipped to communicate the truth.

Juries want honest, sincere communications. They don't like programmed robots. However, "spontaneous" communications are rarely the most successful communications, even by honest and sincere people. Most of the important meaningful communications in life rely on practice, rehearsal, and preparation to achieve effective communication. It usually takes practice and training to achieve sincere, truthful, heartfelt music or communication under great pressure.

This is a very powerful common and often unspoken false assumption in the world of law. Almost nobody in any other communication-intense field would say such things with a straight face. Extensive preparation and very thoughtful careful communication in such a dangerous situation is necessary if we care about the truth.

What You Should Do to Deal with This Assumption: Put your important witnesses through extensive simulations of their testimony. Teach them new communication tools. Give them practice with the new tools. Assess how your witnesses will perform under interrogation. This is important data-gathering.

Effective witness preparation is a combination of teaching about it and doing it. It's a combination of new concepts and new behaviors. It's about feedback. It's about practice. It's about repetition. Most attorneys simply don't think they have the time to do proper witness preparation. They usually have a better-sounding theory about why they don't do it.

Teach witnesses to use a voice that is appropriate for talking to a neutral group of people (the jury) who are curious about what happened to the witness. The "tone" of voice, and the attitude should match an interested jury rather than those that would typically be used in talking to an opposition attorney or even their own attorney. Interrogation school teaches the attorney that it is often wise to get the witness irritated, impatient, angry, et cetera in hopes of getting the attitude and voice that matches those reactions.

Teach your witnesses that they need practice and training even though they almost always wish they were somewhere else. Teach them that they have an especially wise and brilliant attorney because he/she is doing this kind of preparation that most attorneys don't do.

Teach your witnesses that probably 98% of witnesses can get significantly better with training. You will be shocked at how many supposedly good witnesses don't do well when you run your assessment. You will be shocked about how rarely it's a waste of time. You will consistently be glad you did it and so will your client.

False Assumption 10) Witnesses cannot change how they are, how they come across, and what type of people they appear to be.

People vary their behavior more greatly than we typically think they do. These variations might occur across time or settings. Fathers might talk to their wives or children differently than to people at work. They may talk differently to their brother than other men at work. Witnesses might talk to students differently than they talk to interrogators trying to discredit them.

Witnesses can learn to show feelings that would help their cause but which are often hidden. Jurors often misread witness behaviors and habits. These falsely communicating behaviors can often be changed so the witness is better understood. And most of us have experience learning and performing a wide variety of new behaviors throughout their lives.

Witnesses can change their impact. And you can help them do it. You can pick out specific witness behaviors that contribute to jurors' false conclusions and you can change them. For example, teach the witness to lower his chin when he talks so he doesn't seem arrogant. Then have him practice with his chin down. Teach and practice looking at a jurors' face and not turning away.

Ask yourself, and have them ask when looking at their video, what behaviors are contributing to the feeling or conclusion of concern. Don't assume they look arrogant because they are arrogant. Assume that they seem arrogant because they are acting in certain ways and remember that those behaviors can change. Experiment changing the behaviors and study the impact.

Assess. Train. Practice. Coach. The more you do the better the witness will do and the more effective they will be. It will become easier and more natural but never easy or truly natural.

Dr. David Illig [David@LitigationPsych.com] is primary consultant of Litigation Psychology. His home location is Portland Oregon but he practices across the country. He provides services of witness preparation in a wide variety of litigation types with a specialty in medical mal practice. He also provides litigation research, jury selection, case analysis, and case presentation consulting. You can obtain more information about his work at www.LitigationPsych.com.

The September edition of The Jury Expert unveils several firsts: our first reader-requested feature (on preparation of narcissistic witnesses); our first law student author (Jason Miller on buffer statutes); our first author from the Netherlands (Fredrike Bannink on solution focused mediation); our first article on training law students (the DePaul program); and our first Favorite Things (we couldn't choose just one). Help us stay fresh--send in your wishes for upcoming issues--what would you like to see? Tell me...we'll see if we can make it happen.

Rita R. Handrich, PhD
Editor, The Jury Expert

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