

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

by David Illig

Part One of this article was published in the May issue of The Jury Expert ([see it here](#)).

[Editor's note: We continue with this article where we ended in May.]



False Assumption 3) Witnesses are naturally good listeners who accurately hear interrogation questions.

Truth: All humans are **inaccurate** listeners. In fact, the human brain and nervous system that makes up the listening system is what NASA calls an “Error Reduction System.” It is designed to make a huge number of listening errors that gradually get reduced in size upon repeated interactions.

In normal life this system works fine. In litigation, where everything gets written down and where people assume humans hear well and speak well, it creates huge problems. With more stress, and a more skillful interrogator, the listening problem has an even greater effect.

The Interrogation Effect drastically reduces listening accuracy and reduces awareness of errors. It’s a huge problem even for smart people who, ironically,

often have even larger listening problems under interrogation. These listening problems can be so intrusive that their answers often address a different question than is actually asked. And, to compound the problem, witnesses rarely realize it when it happens. The human nervous system works against the witness and needs to be countered by training and practice unless you are happy with a low accuracy rate in witness testimony.

Although some witnesses may intellectually agree that they and other humans are poor listeners, their non-cognitive brain assumes differently. Moreover, the non-conscious brain even assumes that it is a “mind reader.” It assumes that it knows what the interrogator means and again, the witness is often unaware of these assumptions and their consequences. Train your witnesses to listen carefully and to ask questions if they are at all uncertain as to the true question being asked.

A corollary to this assumption is that witnesses listen very *carefully* and with *high intensity* to the questions.

Witnesses, even very successful ones, rarely put great effort into listening very, very accurately. Even in critically important situations. They are used to making errors and correcting them later. And humans are usually unaware of how inaccurate their listening truly is. Humans falsely *assume* they are listening carefully and assume they listen accurately. And we make higher rates of errors under stress.

What You Should Do to Deal with This Assumption: Attorneys need to educate witnesses that they all have a brain that will make many listening errors unless they make some adjustments.

Witnesses need to make adjustments even if they are brain surgeons or CEOs (i.e., “really smart people”). I tell my witnesses that all of us would do better to assume we have a listening problem and that they have to compensate for it in their testimony. It’s similar to a person who needs a hearing aid and finally admits it and starts using it all the time. The witness needs to assume, “I have a listening problem and I have to cope with it and overcome it.” They can’t ignore it and pretend otherwise. It’s not a problem unique to any one of us. It’s simply the way the human brain works.

Many witnesses won’t accept they have a listening problem until it’s clear that they have actually misunderstood the question. Some will only be convinced by a video of the sequence which proves it. It is not uncommon for an MD, CEO, or Ph.D. to miss something so simple as the day, or year, or name of the person a question addresses. Videotape them and give them visual and auditory feedback to illustrate this unconscious, automatic process that must be made a conscious and volitional process.

Teach the witness to use a higher level of intensity, concentration, and focus than is typical. This “Super Listening” is much more intense than normal listening. A person can only use this in special circumstances for a limited time because it’s so exhausting. Part of what automatically occurs as part of the Interrogation Effect is an increase in the problem of inaccurate listening.

It’s interesting that one of the most common interferences to accurately hearing the **question** is the witness prematurely focusing on the **answer**. The simple powerful intervention is to teach the witness to separate the question from the answer. They need to become highly certain of what the question is and what it is asking. Then and only then, after they are certain they know the question, the witness can begin working on the best answer. Human brains and the Interrogation Effect tend to blend together listening to the question and the process of providing an answer. The solution is to separate the two processes. It’s not natural or easy. It takes great effort, but with training and practice a witness can do it.

A simple test you can use with your witness is to have them repeat the question out loud before they are allowed to answer. You will be amazed how often untrained witnesses can’t repeat the question accurately. And if they can’t repeat it out loud, it’s hard to argue that they have heard the question accurately.

Teach witnesses that they need to chew and chew on the question until they are certain what it is actually asking. Teach them to listen at a heightened, intense, unnatural level. Teach every witness that their brain will act as if it can read minds and determine meanings. Teach smart witnesses even more deliberately. Careful and repeated assessment of the question can often allow the witness to realize the brain’s false assumptions and assumed meanings that were not actually present in the question asked. Once they spot these unclear words or statements, unclear meanings or pronouns, they can be taught to either ask for clarification, state that the question as asked cannot be answered, or they can define the word(s) out loud and then answer that question. It often sounds like this: “If you’re

asking me whether I was going inappropriately fast, my answer is no.” It’s basically a statement of the question that the witness proceeds to answer. It may or may not be what the interrogator meant.

False Assumption 4) Witnesses say what they intend to say.

Put another way, witnesses say what they mean the vast majority of the time, and witnesses know what they have said in response to a question the vast majority of the time.

Truth: People, even smart, educated, truthful people, often do not say what they mean to say and prefer to say. All jurors and civilians know this about themselves in normal life situations. Furthermore, humans often believe they have said things very differently than they have actually said them. We are often confidently wrong. As humans, we rarely say exactly what we want to say or communicate exactly what we want to communicate.

The human communication system is designed to make speaking errors and then correct them through a series of interactions with an active audience who responds. The legal setting does not assume these truths about human nature. It assumes accurate listening and accurate speaking with full awareness even though that is not reality in normal life. Therefore, witnesses need to learn a special level of both listening and speaking that is unusual. And you have to help them learn this.



A corollary to this false assumption is that it’s best to say what comes to your mind first because it’s most likely closest to the truth.

Witnesses often erroneously believe that what first comes to their mind in response to a question is what they should state as their answer. They assume that this is most likely closest to their truth. It is folklore (especially in the legal world and criminal world) that what comes to the mind first, especially in response to an interrogation question, is closest to the truth.

The Interrogation Effect actually makes it unlikely that what first comes to the mind is the best. The Interrogation Effect can actually be more powerful than the truth in determining what first comes to a witness’s mind. It is astounding what things honest and smart people will say because of the Interrogation Effect. Making truth the more powerful force takes some special effort.

A second corollary to this false assumption is that witnesses think carefully before they answer.

They may *think* they think carefully before every answer. Yet, most witnesses say what comes to their mind first without thinking carefully -- at least not nearly as carefully as is needed in a litigation setting. The Interrogation Effect pulls out what first comes to their mind. It's like a magical WD-40 that sprays the brain and lips and makes it more likely that the witness will offer an answer that is less than ideal. The Interrogation Effect makes it like trying to walk on a steep mountain and gravity forces you downhill even though you want to go in another direction. And when the third answer that comes to mind is the best, truth-telling answer (after the first answer has already been spoken), then "Houston, we have a problem..."

What You Should Do to Deal with This Assumption: One of the first things is to teach your witnesses the realities of listening and speaking. Teach them how the brain and the Interrogation Effect fool us into listening poorly, into speaking without consideration, and thus not being as effective as we can be on the witness stand.

Teach witnesses that this isn't a personal weakness but a part of our human nature. I especially like to teach very smart and educated witnesses that often a fast brain can cause us even more problems than a slow brain. It's literally a "complication" of a good brain, and a big, fast brain can fool us quickly and certainly with an automatic response. Teach your witness, especially if they're smart, that the most important step is to keep their mouth closed so nothing comes out first because of the interrogation effect. (Now *that* is really being smart.)

Teach your witness that they must write, edit, rewrite, and rewrite their answer again in their mind before they put it out there for the record. Tell them it's similar to writing without being able to edit after you write something down on paper. You have to do your editing, at least most of it, before you open your mouth. That's very different than normal life.

Teach your witnesses that this will be their most careful and thoughtful communication. It's like crawling across a field of well-hidden mines and booby traps. Looking thoughtful looks good on most people and you might want to have your witnesses practice an expression of thoughtfulness.

Teach your witness to generate three possible answers to the question. Teach them to analyze each one silently as to whether or not it communicates their truth. Then have them pick the best of the three, or generate another if all three fall short. You're basically teaching the witness to silently complete the assessment and editing process that normally takes place through discussion and interaction. Because that 'real life' process is not possible and is also too dangerous in this setting, the process has to happen on its own, in the witness's head, and during silence.

A critical truth to teach your witnesses: The secret to becoming a very good witness, even just a safe one, is **silence**. If a witness learns how to use silence they have a chance to become a good witness. If a witness doesn't master silence, they will never be the best witness they can be.

Why silence? Because it's only during silence that the witness can really become crystal clear about the question and the answer it demands. And it's only during silence that the witness can analyze possible answers and make a decision about which one is best. It is ironic that silence terrifies most attorneys. They are so used to fighting for every piece of air time from other attorneys that silence is rare. In fact, attorneys tolerate silence less than most others. You will have a huge edge if you teach your witness to use silence. Talking is easy. Silence is difficult and powerful. Teach it, demonstrate its utility, and allow your witness to practice being comfortable with silence.

It's wise to teach your witnesses to use this model for almost every question. Set the pattern from the beginning, even if it's not necessary. Maybe they don't have to create three answers to every single question but it's worth doing most of the time:

"Where do you live, Dr. Illig?" Under interrogation, if we slow my brain down enough to hear what it's doing... and keeping my mouth closed..... You might hear these three responses:

- 1) "Why are you asking about my home, you jerk?"
- 2) "8311 NW Reed Drive."
- 3) "I live kind of between NW Portland and Beaverton at 8311 NW Reed Drive."

In many settings the third answer will feel best to the jury who hears it.

Your witness may say this is too mechanical, or too unnatural for them. It bears repeating: testifying in a legal situation is not natural.

Teach your witnesses that being a good witness means they are *not* using automatic, spontaneous responses. A large part of the Interrogation Effect is to get automatic responses from a witness. That puts the interrogator highly in charge. A good witness should use intentional, manual responses -- the opposite of automatic, habitual or natural responses. A witness should respond to every question thoughtfully, purposefully, and with full intention. This applies even with emotional responses and intense feelings. The goal of a good interrogator is to control the witness. The goal of a good witness is to control themselves and not allow the interrogator to control their responses. To gain control a witness has to get emotional and intellectual separation from the interrogator.

Becoming a good witness means defying behaviors that are normal or typical in everyday life. It takes training and practice under interrogation to achieve effective communication. It can be learned to some worthwhile degree by almost every witness, no matter who they are or what level of education they possess.

Do your training in a simulation format of deposition or trial. With practice and training these approaches can become more comfortable and easier to navigate. But they never get really comfortable or really easy, even if it looks like they do.

Next issue we will cover more False Assumptions and Truths about Witness Preparation and testifying in deposition and trial. Start using these ideas today.

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Citation for this article: *The Jury Expert*, 2008, 20(2), p 23-27.

Thanks for looking at the July 2008 issue of TJE. This month we are pleased to bring you not only diverse but international perspectives. This issue of The Jury Expert has authors from England, Canada, and all across the United States.

This time we're all about witness preparation, the eye witness research literature, a new 'secret weapon' for ensuring your witnesses remember facts as accurately as possible, religion in the jury box, case themes, a new form of forensic animation, and understanding RSS without any real work on your part. Plus our July 2008 "favorite thing" is hidden away inside.

We appreciate the feedback you've given us and are eager for more! Tell us what you think or what you'd like to see in The Jury Expert by simply sending an email to the [Editor](#).

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The Jury Expert [ISSN: 1943-2208] is published
bimonthly by the:

American Society of Trial Consultants

1941 Greenspring Drive

Timonium, MD 21093

Phone: (410) 560-7949

Fax: (410) 560-2563

<http://www.astcweb.org/>

The Jury Expert logo was designed in 2008 by:

Vince Plunkett of *Persuasium Consulting*

<http://www.persuasium.com/>

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