

Witness Preparation: Hidden false assumptions, Real truths and Recommendations (Part One)



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Introduction

Attorneys and witnesses make basic assumptions that greatly impact their behavior both in preparation for testimony and testimony itself. Some of the assumptions are accurate, very obvious and attorneys consciously know they are using these assumptions. These assumptions are “in awareness and fully conscious” to attorneys and witnesses. However, attorneys’ and witnesses’ actions, behaviors, attitudes and approaches betray these assumptions.

Instead, their behaviors, actions, attitudes and approaches are more consistent with other “false assumptions.” Too often these “false assumptions” operate at another level of brain process which is not in full awareness or full consciousness. They happen outside our awareness in the unconscious like background computer programs which are operating that you can’t tell are having an impact. Attorneys and witnesses use these unconscious assumptions without knowing it, like the giant purple dinosaur sitting in a room that nobody mentions.

Over time, I will lay out a series of frequently operating “unconscious” false assumptions and clarify what the more correct assumption should be to ensure effective witness preparation for attorneys and for witnesses. Finally, I will provide some recommendations about changing your witnesses’ assumptions, changing their behaviors and demonstrate what witness preparation can look like when you follow more correct assumptions.

If **YOU** are aware of the false assumptions held by many in the litigation field that can sneak up on you, and you take them into account in your practice, you will have a strong competitive edge over your adversaries and your peers. You will get better results and your clients will greatly benefit. This article lays out numerous false underlying assumptions about witnesses, testifying, deposition and trial testimony, as well as witness preparation. Your first reaction might be that that you and your peers rarely use these false assumptions. They seem so obvious. That is the magic here. These false assumptions are often in operation, even when we think they cannot be.

False Assumption 1) Witnesses are prepared for testimony through their everyday communications and experiences.

Put another way, our normal life experiences prepare us for being interrogated by a professional interrogator who is extremely experienced, skilled, and well trained. Perhaps our normal life is good preparation, and being interrogated is not that difficult. Perhaps not much preparation or practice is really needed. (Cross examination or deposition is truly an “interrogation” and will be referred to as such. Direct examination is basically a critically important interview that tells a story through the questions and the answers.)

This is one of the most powerful, and most consistently operating hidden FALSE assumptions in the litigation field. It operates in average, good, and in great attorneys. More so than anyone would want to admit. It continues to operate just because it is so obviously wrong and presumed not to be operating.

This assumption suggests that most people will be able to testify well and therefore little preparation is needed or performed. Given the many thousands of hours of depositions that attorneys sit through, it's not surprising their brains lose awareness of both how familiar *they are* and how *unfamiliar* their client is with the process of interrogation. Attorneys lose track of what an unusual universe they spend their lives in. Witnesses do not live in the world of interrogation.

The reality is that interrogation by an expert is extraordinarily different than most life experiences. It's very different than typical questions and answers in normal everyday life. The professional interrogator's goal is to make a witness look bad, support their own side of the conflict and weaken the story of the witness.

The reality is that being interrogated by a trained and skilled interrogator is very, very difficult for the witness. It is an unusual and strange situation for almost every witness and almost every witness requires preparation and training for extremely difficult and unusual tasks.

A corollary to this false assumption is that honest, sincere, intelligent, competent, innocent, educated, smart and likable witnesses will most likely be good witnesses in deposition and/or trial. Therefore they do not need much preparation.

There is very little correlation between these positive attributes and success as a witness. They often make very poor witnesses without training. Skillful interrogation is designed to make honest, intelligent, competent, smart, educated people look bad and reduces their ability to get their accurate story out. Most interrogation techniques are developed to be used against smart people, they frequently lead to inept, inaccurate, or untruthful responses.

What You Should Do About This Assumption:

First, you need to recognize it as a false and common assumption. Most witnesses actually believe their experiences prepare them for deposition or trial. Teach witnesses that deposition and trial testimony are very *different*, and very *unusual* compared to their life experiences. Teach them it is *difficult* to do. It is not like their normal life and that many normal typical patterns will not work in testimony.

The witnesses need to be told that they will have to learn new unusual behaviors and patterns in order to be a really good witness. Teach witnesses that even though they are a successful CEO or a brain surgeon, or an honest minister, they will still have to learn new patterns and give up some of their old ones. Persuade witnesses that this learning will take training and practice.

Ironically, the more professional, educated, and experienced the witness, the more you may have to work to communicate to them that the interrogation situation is both different and difficult. You need to teach them that no matter who they are they still need deposition/trial training and practice. And it may happen despite their kicking and screaming.



If you can't get your witness to agree to training and practice, try convincing them that you need to do a "full assessment" of their testimony to reassure you, the carrier, your partner, them, or somebody. The full assessment should be a formal simulation of their deposition, cross or direct. Record the whole thing on video. Then analyze it and show them where they were weak and how training and practice might improve their performance. Make them watch part of the video if they can handle it. Most witnesses will need additional work and will show improvement. Most will want to do it.

False Assumption 2) The honest witnesses' truth is more likely to be communicated than something other than their truth.

Put another way, getting the truth across during testimony is a "natural act," and the most likely outcome. However, getting something other than the truth out of a truthful witness is actually the most likely natural event. It has nothing to do with lying. Under the bizarre and stressful conditions of skillful interrogation, the truth is the improbable outcome, not the most likely, especially with an untrained witness.

A witness has to fight to get the truth out and across to their audience. Witnesses operate under the assumption that if they are *intending to be truthful* then the truth is what comes out and gets across to the audience. In other words, if they are *being* truthful, then the truth easily does come out and gets to the audience. That assumption is wrong.

What tends to come out of a witness under expert interrogation "naturally" is quite often something other than what gets the truth across and is often an inaccurate picture of the witness. This is called: "**The Interrogation Effect**" (IE).

There are many components to the IE. It affects both the content and the impact of the witness and the testimony. Years, thousands of hours of depositions, as well as formal training of the attorney build the IE effect. The setting of interrogation and the interrogation process itself can have a huge and often hidden impact on the target witness. An experienced interrogator exerts numerous and powerful subtle and non subtle influences, many of which the interrogator is unaware. And many of the interrogation influences are not detectable to the witness. But they are very powerful. *The "Interrogation Effect" significantly impacts almost every witness.*



Some experts in the field of hypnosis actually say that part of the IE impact is basically hypnosis, which they define as unconscious influence. It is directed by someone in opposition to the truth of the witness and who is offering an alternative truth. I once had a surgeon-witness give an answer during deposition training of the number "thirteen." He stopped about five minutes later, shortly after we taught him to correct any errors as soon as he noticed that he had made one. He told us that that answer wasn't "thirteen." We asked him what the correct answer was, thinking that maybe it was eleven, ten, nine, or eight. Instead, he told us the correct answer was "one"! When we asked him why he said "thirteen" he said he didn't know except that he felt this huge urge to give a much bigger number and he couldn't stop himself. He was stunned. After that he became a really good student. Ironically, the question was a trivial one: "How many med schools had you applied to?" But his brain played a trick on him. The IE impacted his brain.

A corollary to this false assumption is that honest, sincere, intelligent, competent, innocent, and likable witnesses won't have significant difficulty getting their truth across under interrogation.

A witness does not know this is false and nobody usually tells them. You need to. Once again this applies to honest, intelligent, competent, sincere and likable witnesses. Almost all the difficulties of interrogation apply fully to all types of people. The Interrogation Effect has a large impact on all of them. Fighting for the truth against a skilled experienced interrogator is not easy or probable from a witness just because they are honest and likable or competent in their world.

There is little correlation between being able to get the truth across under interrogation and being honest and likeable. No more than being likeable and honest or an M. D. makes you a good comedian, or speech maker. Almost all people need support, training and practice to succeed in this unusual environment.

What You Should Do to Deal with this Assumption:

Teach the witness that getting the truth across takes lots of work, effort, and intensity. They have to be very clear about what their truth is and you can help them. Then they have to work very hard to get it across to their audience. Teach the witness that they have to fight against the interrogation effect and they have to fight for their truth.

That is *different* than fighting the interrogator. In fact, fighting the interrogator is usually one of the seductions of the interrogator effect. Instead of fighting for the truth the witness ends up fighting the interrogator. Teach witnesses that they have the right to fight for their truth. This *is not* attempting to get the opposition attorney to agree with them. It is making sure that their clear truth is stated firmly, strongly, and clearly so the audience knows what they believe their truth to be. Teach them repeatedly that they *have permission* and *duty* to state their truth as they see it. *And they must.* Teach them to resist the Interrogation Effect. Teach them to determine what is their truth, and teach them to state their truth clearly, strongly and effectively.

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

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