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Beware of the Tricks Used to Encourage a Witness to Volunteer

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by Dr. Merrie Jo Pitera

Most witnesses do not understand the purpose of a deposition and believe their job is to teach the questioning attorney everything they know; indeed, many believe if they did any less, they "wouldn't be telling the truth." But a witness who talks too much, either in deposition or trial, can be a liability because volunteering information can potentially highlight vulnerabilities for the other side. Witnesses need to be educated about the purpose of a deposition – i.e., it is a fact-finding opportunity for opposing counsel, not an interview or a casual chat. Given this purpose, it is the opposing attorney's burden (and job) to ask the *right* question, not a witness' job to help and offer more than was asked. The first step in the process of getting a witness to stop volunteering too much information is educating the witness about the strategies opposing counsel might use to goad new (and sometimes even experienced) witnesses into talking a bit too much, thereby opening up potential and unexpected vulnerabilities for the case.

While there are many strategies opposing counsel typically employ, the primary ones to watch out for are summarized below.

- **Acting nice and friendly.** Witnesses must always be wary of a "friendly" opposing

counsel. Of course, there is a possibility the attorney really is a nice person, but chances are she is merely being friendly as a strategy to disarm the witness. Virtually every witness has psyched himself up for an abrasive adversary. When he instead meets someone who is very friendly, he drops his guard and wants to be friendly and helpful in return. He believes if he offers short answers, he will be the one perceived as being the abrasive obstructionist.

- Specifically, a witness should be cautious of chatty conversations initiated by opposing counsel on breaks and off camera. These conversations are designed to find some common ground with the witness in order to get him to drop his guard. A similar incident happened in a case I consulted on that was a few weeks from trial. I was hired because this witness didn't have the "witness gene" and did an "awful" job during his deposition as he "talked way too much and opened up unnecessary rabbit holes" that the defense now had to deal with. My job was to "fix him."

While reviewing the deposition video, one thing was clear, the plaintiff attorney found common ground that ultimately had the effect of relaxing the witness and consequently, he over-volunteered. During this corporate representative's initial witness prep session, counsel had profiled the plaintiff attorney to be an obnoxious jerk. On the day of the deposition, instead of using his usual persona, the plaintiff's counsel started the deposition using a cordial tone. About three questions in, when asking about where the witness had received his Master's degree, the plaintiff attorney commented that he *also attended* the same institution. Not only were there *decades* between their attendance, but the witness attended virtually and received a long-distance degree. Despite never having stepped foot on campus, the witness still felt a kinship with the plaintiff's attorney. Their shared alma mater provided the plaintiff attorney an opportunity to exploit their "common" experience as it had the immediate effect of disarming the witness. That is, he started calling the attorney by his first name (an absolute "No No" in deposition or trial behavior) and began to offer additional information beyond the scope of the question in order to be helpful to his "frat brother." Exactly the desired effect the plaintiff attorney was seeking as many vulnerabilities were volunteered via the witness' long-winded responses. This attorney clearly did his homework and figured out something in common with the witness, exploiting it to his advantage.

- **Putting a long pause between the witness' answer and the next question.** Sometimes an attorney will pull a "Columbo" act and look like she is fumbling around trying to organize her notes or "thinking" of the next question when in reality, she is intentionally inserting a pregnant pause. Those gaps are ever so uncomfortable because we have been socialized in this part of the world to fill in gaps of silence. The witness usually has the urge to fill the silence by adding to his previous answer, even after his answer was complete. Because the witness' focus tends to be on the last answer given, the pause helps compel him to fill in the silence with *new information*. Educating your witness to become "comfortable with silence" takes practice but is vital.
- **Playing "dumb."** Not only do attorneys utilize the disorganized Columbo approach, they also play the "I am uneducated about this subject matter so please teach me more about it" role. We all know any attorney worth her salt will either have researched the

witness' topic or will have a specialty in the area herself. By "playing dumb" about the topic, she compels the witness' natural tendency to teach her about the subject matter he knows so much about. When a witness hears an attorney say something like, "I really don't understand this technology. Could you please help me understand?" it should be a signal that the attorney is hoping the witness will step into a teacher role and will volunteer more information about the subject matter than necessary. This puts the witness in the role of a teacher, which will be difficult to break out of if he is not aware of this tactic in advance.

- **Expressing disbelief or shock at your response.** An attorney who provides a surprised retort to an answer is using this strategy to put the witness on the defensive such that the witness feels the need to expand his answer to justify it. For instance, when the questioning attorney responds with a surprised, "Really?" the witness gets the impression that something must have been "off" about his answer or that he didn't communicate it clearly. The danger is that a witness usually feels the need to defend what he said, and as a result, volunteers information that was beyond the scope of the original question.
- **Asking the same question repeatedly.** One of the most common pet peeves for witnesses is being asked a repeat question. Witnesses already feel put out and inconvenienced by having to give a deposition. Then, to make matters worse, the opposing attorney, over the course of the deposition or maybe in succession, asks the same question multiple times (or possibly with slight changes). In addition to frustrating the witness into taking a tone by answering sarcastically, "I have already answered that question," many witnesses end up volunteering additional information. This happens primarily because the witness wants the attorney to move on. They believe by adding new information the attorney will be satisfied and stop asking the question. Instead, the new information typically opens up new lines of questioning that may expose additional vulnerabilities, as well as increasing, among other things, the length of the deposition.

The job of witnesses is to provide the information asked, not engage in a "brain dump" of everything they know. Witnesses who stay focused on the question not only help their case, but they also help keep their depositions shorter – the less they volunteer, the fewer rabbit holes the opposing attorney can go down. Educating your witnesses to these strategies before the deposition will help them guard themselves against the tricks opposing counsel play in an effort to get witnesses to volunteer information and stray off course.

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