

*Witness Preparation:*

# Lessons Learned For Avoiding Catastrophic Failures



Your key witness has just finished their deposition. They were combative, defensive, and unlikeable. Worst of all their testimony was off message and damaging. They did great in the prep sessions and you were sure they would do well in the deposition too. But now your case is in a place you had not counted on. It's a disaster.

Unexpected testimony can be catastrophic in litigation. Bad depositions can make small cases large. Bad trial testimony can lead to inequitable (i.e. nuclear) settlements, nuclear verdict awards, and at times, damaging headlines.

## WHY DO GOOD WITNESSES GO BAD?

Why would an engaged, likeable, and good-natured line-level employee affirm assertions they do not believe are true? Why would a bright, patient, and charismatic executive suddenly become antagonistic, firing out scripted corporate jargon with no relation to the questions being asked? Why would a deeply credentialed, high-priced expert repeatedly limit, qualify, and even express skepticism toward their own published opinion?

Witnesses go bad when they begin their testimony with unrealistic expectations of success, only to discover they lack the skills necessary to maintain control while facing the pressures of real testimony. It is one thing for the witness to do well in preparatory sessions where they are not on the record and can call for a timeout or a do-over; there is no judge, no jury, no opposing counsel, and no sworn oath to maintain. But what happens to the same witness if they simply cannot stand up to opposing counsel? The witness becomes anxious, confused, agitated, and may even panic. When stress levels get high enough, it can trigger the built-in "fight or flight" response, leading the witness to either acquiesce to any assertion (e.g. flight mode) or become openly combative (e.g. fight mode).

## THE SCIENCE OF PANIC

Any psychological stress from simple worry to actual panic is capable of reducing the witness' ability to focus, listen, and think clearly. Stress has both a cognitive and physiological impact and thus negatively affects both verbal and nonverbal behavior; a point which is critical since witness demeanor impacts credibility as much or more than does response content.

Each of us is equipped with what is termed a sympathetic nervous system, responsible for regulating the "up and down" functioning of our bodies and minds. The system's job is to ensure that when our mind is calm our body is calm, and when our mind perceives an imminent threat that we take immediate action rather than freezing and doing nothing. A flood of hormones is released, including adrenaline and noradrenaline. Pupils dilate. Muscles tense. Perspiration occurs. The heart beats faster and breathing becomes quick and deep. There are cognitive effects as well. Perception becomes skewed. Individuals tend to misattribute hostile intent in others, perceive ambiguous questions as personally negative, and overestimate their own levels of personal power and control.

All of the symptoms described above, both the cognitive and the physiological, are evolutionarily adaptive and beneficial if facing a charging lion on the savannah and there is no time to weigh the relative risks and benefits of running or standing your ground, but these same symptoms can be hugely detrimental to a witness' ability to testify.

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# HOW DO YOU AVOID CATASTROPHIC TESTIMONY?

A threat is only threatening to someone not equipped to deal with it. The kinds of psychological stresses that lead to catastrophic testimony can be avoided by providing the witness with realistic experiences so they truly know what to expect, as well as the training to ensure they acquire the skills required to stay calm, engaged, professional, clear minded, and in control.

## ROLE CLARITY

It is essential that the witness understand what their role is, and is not, to ensure they do not assume any obligations or objectives that are unachievable. The witness has only one true role; to listen closely, consider carefully, and deliver an honest answer. Yet witnesses often assume other duties. They often come to believe their job is to memorize and deliver scripted lines, persuade opposing counsel, defend their choices as well as the choices of others, know everything, forget nothing, and provide spin control. Sometimes they even believe it is their job to win the case. What is shocking is that witnesses frequently pursue these unachievable objectives despite being told by their attorney not to.

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Why would the witness misconstrue their role? Consider how witness preparation often proceeds. After an initial tutorial on the claims and key case facts and a review of documents and records, counsel asks the witness a series of mock examination questions. The Q&A session is put on hold the first time counsel hears a response that represents a risk to the case. Counsel then returns to their previous lecture on the relevant case issues and supplies a set of suggestions for better answers. It is our experience that the person doing most of the talking throughout a typical witness preparation is the attorney. This occurs because counsel is conforming to the traditional classroom model of learning wherein a student passively receives information via lecture by a teacher and is later tested to determine their levels of retention. If the student does not “pass”, the lectures are repeated.

The classroom model of learning has its place in witness preparation; however, if it is the only model employed it sends a clear message that the witness’ job is to study, memorize, and recite. Recitation is a fundamentally different cognitive activity than listening and pondering.

Witnesses need to learn how to truly listen, how to deeply consider, and how to truly deliver their answer. But a witness can no more master these skills via the classroom model of learning than could a person master the game of golf by reading about it. What is needed is to practice the fundamental skills under the watchful guidance of an expert, and then to actually play practice rounds.

## **PREPARATION IS NOT THE SAME AS TRAINING**

Contrast the classroom model of learning discussed above with a competency based, or training model of learning. In the training model, the witness can practice the critical skills of testifying while receiving timely feedback from an observing expert and is given the opportunity to immediately apply the advice they receive. Basic skills are taught, practiced, and mastered, before more advanced skills are addressed. Finally, the witness is tasked with performing under the most realistic conditions possible. In this way, the witness is not only told their role but they actually learn how to perform and what to expect.

Acquiring new knowledge is foundational for acquiring new skills, but knowledge is not equivalent to skill. So too the classroom model of preparation lays a foundation for, but is not a replacement for, skills training. This is why the witness' performance in classroom style preparation is not necessarily an indicator of how they will perform under oath.

To be clear, we are not recommending that classroom style preparation be dropped in favor of competency-based skills training, but rather that both models be utilized in a manner that best helps the witness to develop.

### **PHASE 1: PREPARATORY EDUCATION**

**Teach them about the case and their role.**

### **PHASE 2: SKILLS TRAINING**

**Practice with feedback to master the skills required to testify.**

### **PHASE 3: PERFORMANCE TESTING**

**Test their ability to perform under pressure.**

## BEST PRACTICES FOR PHASE 1: PREPARATORY EDUCATION

Witnesses must be taught about the case before they can practice testifying. There is no replacement for engaging in a thorough case review, discussing the rules of testimony, ensuring the witness understands the case themes, the record, and their talking points, and of course addressing any specific concerns the witness may have. Each of these tasks is knowledge-based rather than skills-based in nature, and as such, the traditional classroom model of learning is most appropriate.

### INITIAL CONSIDERATIONS

First, whether they are a fact witness or a corporate representative, be it preparation for a deposition, or for trial testimony, the witness must be told in no uncertain terms that it is not their role to tell a story, to spin, to persuade, or to win the case. Their job is simply listening carefully and telling the truth.

Second, it is important to identify the level of sophistication and experience of the witness and adjust their preparation accordingly. A witness who has never testified and is concerned about their role as a witness should be treated differently than a sophisticated and experienced witness who already has the skills to handle an in-depth briefing on the issues and key facts.

Third, the witness needs to understand how they fit into the context of the case as a whole. Why is the witness' testimony important and how does it impact the case? How might their testimony fit into the defense or the plaintiff narratives? An understanding of the big picture will go a long way in helping the witness comprehend and participate in the discovery process.

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### DISCUSS THE BASICS

A common mistake made by many attorneys is to overlook how little their witness actually knows about the litigation process. The witness needs to understand the basics. When will my deposition take place? Who will be in the room? How does it work? What are the rules? Will I be videotaped? How long will it last? Will my attorney be with me? Can I ask questions? Can I ask for breaks? What if I don't feel well? Can I get into trouble if I misspeak, forget something, or remember something and want to change my answer? When left unanswered, these types of seemingly mundane questions linger in the mind of the witness, becoming distractions that can cause them to struggle with even the simplest instruction.



## DOCUMENT REVIEW

Witnesses need to be made aware of the broader pattern of case facts and key issues relatively early into their preparation because these serve as a foundation of understanding for the myriad lessons and questions that will come later. In the case of a corporate representative who may be responsible for policy, for example, it is vital for them to understand the elements of the particular claims, how their expected testimony fits into those elements, and whether there are alternative policies in place that may change the outcome of a claim.

When reviewing specific facts, it is not enough to simply ask the witness what they remember. Rather, it is necessary to review the actual documents, emails, and letters created by that witness, or any other significant documents produced during discovery, so that they become truly familiar with the record prior to their deposition.

Depending upon the type of deposition, opposing counsel can learn what documents were reviewed by the witness in order to prepare for the deposition. In order to avoid such mandatory disclosure, counsel can use a PowerPoint presentation that contains highlights or summaries of documents. Because the PowerPoint is work product, the witness looks at no “documents” but still gets the benefit of critical information.

## INITIAL INTERVIEW

The witness can study the case materials for several days, but until they are asked to respond to questions that tap into the key issues, the witness may not fully understand how to integrate the knowledge they have acquired. We recommend that an initial interview be conducted wherein counsel asks questions that help the witness begin to think about the case facts and the records they have reviewed within the context of their role in the case, and the asserted claims. We call this an initial interview to distinguish it from the mock examination process that will occur later.

As the review of records and initial interview wind down, the witness is now ready to learn the details regarding the process of testifying. Counsel should avoid over burdening the witness with too many specific “tips and tricks” but rather should focus on the basics of testifying, while frequently checking to ensure the witness comprehends what is being taught and is not becoming burdened with any wrong assumptions.

## VIDEOTAPE DEPOSITIONS & OTHER CONSIDERATIONS

A video deposition exposes aspects of the witness that cannot be gleaned from a transcript. When preparing for a video deposition, non-substantive considerations such as attire, hand gestures, facial expressions, where to look, and voice tone need to be considered. It can be helpful to show the witness a few short clips from previous video depositions as a learning tool in order to demonstrate the kinds of mannerisms to adopt or avoid. Watching a video deposition will also allow the witness to get a feel for what types of questions to expect and the pace of a typical exchange, as well as an overall sense of the norms for behavior and demeanor.

Notwithstanding camera issues, the witness should have a sense of who will be sitting on the other side of the table. Will opposing counsel try to intimidate the witness or play nice? An advance scouting report of the personalities in the room will go a long way in helping the witness prepare for a wide range of personalities.

## BEST PRACTICES FOR PHASE 2: SKILLS TRAINING

In the skills training phase, the witness is tasked with putting into practice what they learned in the preparatory education phase.

Skills training sessions should begin as a natural progression from the open structure of the initial interview. Initially mock examination questions should be simple and non-threatening, and the witness should be allowed to call for timeouts, discussions, and do-overs at will. Later, as the basic skills are acquired, their power to call for timeouts should be taken away. In this way, the witness develops their basic skills (e.g. listening, pondering, delivering) before learning the more advanced skills, such as how to get themselves back on track after they have lost focus or derailed. As the witness progresses, counsel can begin to layer in more difficult questions. At latter stages, they may even come to include the use of objections and curve-ball questions.

As the mock examination becomes increasingly realistic, it is critical to remember that each witness reacts differently to pressure situations. People do not typically develop and learn in a steady, linear fashion. A step or two backward often precedes a leap forward. Counsel should watch for signs of agitation and fatigue and react accordingly.

**This three-part training method, when followed diligently, can be transformative, radically improving the witness' ability to perform well under pressure.**

Skills training sessions should employ the following three-part method from beginning to end; (1) careful observation of the witness and the calling for a timeout upon observation of any form of distractedness, anxiety, confusion, or delivery of a problematic response; (2) making inquiry into the difficulty and providing targeted feedback and actionable advice; and (3) repeating the difficult line of questioning to provide the witness with an opportunity to put the advice into immediate practice. This three-part training method, when followed diligently, can be transformative, radically improving the witness' ability to perform well under pressure.

Achieving real and lasting improvement will depend on both the timeliness and the quality of the feedback and advice. Any signs of stress, even when coupled with an acceptable answer, are cues to call for a timeout to make inquiries and provide guidance. If these moments are missed, key learning opportunities are missed as well. In the skills training phase it can be difficult for a single person to fulfill both the examiner's and the observer's role. Whenever possible an additional person should be included to carefully observe the witness from the viewpoint of a fact finder.

# THE BASIC SKILLS OF TESTIFYING

**A**

**LISTENING (before thinking)**

**B**

**PONDERING (before speaking)**

**C**

**DELIVERING (with confidence, and then returning to step A rather than worrying about the last answer)**

This ABC model may appear obvious; however, actually performing each step separately and in sequence does not come naturally. The ABC model must be taught and practiced as a process that is distinct, sequential, cyclical, and is applied to every question.

Why do these ABC's not come naturally? In normal conversation people typically blend the three activities together. They consider what to say while listening. And they are often still considering the full scope of their answer while speaking it. New questions are misinterpreted because the respondent is distracted with concerns about the effectiveness of their last answer.

Mastering the ABC's is not easy, but it can be done; and the results can be stunning. Witnesses become relaxed, engaged, and confident, which of course helps their credibility ratings if being video recorded or appearing live at trial. The content of their answers improves as well. The relaxed witness thinks more clearly because their cognition is not being negatively impacted by stress reactions.

## A LOOK INSIDE THE MIND OF THE WELL-TRAINED WITNESS

What follows is a review of the thought processes of a trained witness as they employ the ABC model during testimony.

### A. ACTIVELY LISTENING TO THE QUESTION

By clearing their mind of any distracting thoughts, and simply focusing on hearing the question itself, the witness avoids the common mishap of misinterpreting the intent of the question and providing a non sequitur response. Answering outside the scope of a question is harmful to the witness' credibility because it appears defensive and can signal jurors that the topic is an area of vulnerability.

### B. PONDERING TO ACQUIRE THE SIMPLE TRUTH

After receiving the question in its entirety, the witness will next decide what type of information the question is seeking. Many questions are in fact interpretable in multiple ways. The witness will reword the question in their own mind, based on their own interpretation of what type of information the question is seeking, and what type of information they believe it would be most beneficial for a fact finder to hear. The right to interpret a question that carries multiple possible interpretations is a cornerstone of the witness' power base.



Next, the witness will actually ask themselves the reworded question, using their internal voice, and will then listen for their own natural answer. Pondering is the process of silently asking oneself a question and listening for one's own natural response. It is an ability each of us retains. People frequently ponder life's more difficult questions, but they rarely choose to ponder in everyday life when answering someone else's questions. By encouraging the witness to apply the pondering technique during their testimony, they learn how to identify what they in fact believe is the simple, unvarnished truth, which is often quite different from what they have come to believe they are supposed to say. In training sessions this technique often reveals new information that counsel was not previously aware of, and which may be quite valuable.

Finally, the witness will silently speak their answer in their mind, in order to ensure it is what they want to say. The process of silently stating the answer to oneself before speaking it aloud is essential in that it helps the witness to realize if a possible response is not in fact their best answer. When this occurs, the well-trained witness will either repeat the three stages of the pondering process, or they will simply ask examining counsel to please repeat the question. In either case, the witness has avoided delivering a less than ideal response and remains comfortably in control of their testimony.

**The skills training phase concludes when the witness demonstrates their ability to consistently listen carefully to each question, take their time to consider what the most truthful answer to that specific question is, and can deliver their answer in a manner that inspires trust no matter how seemingly mundane, or apparently vindictive the questioning becomes.**

### **C. DELIVERING THE ANSWER**

The witness will deliver their answer calmly and confidently, using their voice as an instrument to emphasize the meaning of their message, while making eye contact with either the examining attorney, or the jurors, as appropriate. Demeanor and voice tone matter a great deal to jurors and it is critical that the witness learn to maintain a professional, confident and engaged tone and demeanor throughout their testimony. We teach that, in trial, if the answer is simple, it should be delivered to the examining attorney; however, if the response is an explanation or an opportunity to teach, it should be delivered to the jury to ensure they comprehend the message. In a video recorded deposition, we recommend that all answers should be delivered to the examining attorney, rather than while looking into the camera lens.

We often encourage witnesses to practice their ABC skills by "thinking their thoughts aloud" in the training session. In other words, to engage in every step listed above using their actual voice. In this way, counsel can listen in on the witness' thought process and make sure that they are practicing each step properly. At first this method can feel laborious and will lead to awkwardly long pauses in the rhythm of the questioning. There are no short cuts. The length of the pause diminishes as each skill is acquired and soon enough the pausing and the speaking of thoughts aloud is replaced by testimony that is consistently calm, polite, professional, and perhaps most importantly, predictable.

The skills training phase concludes when the witness demonstrates their ability to consistently listen carefully to each question, take their time to consider what the most truthful answer to that specific question is, and can deliver their answer in a manner that inspires trust no matter how seemingly mundane, or apparently vindictive the questioning becomes.

# BEST PRACTICES FOR PHASE 3: TESTING BEFORE TESTIFYING

In Phase 2 the witness acquired the skills required for effective testimony, but it remains to be seen whether they can they perform as well under real pressure, or if they are still at risk for derailing.

Predicting how the witness will do under oath requires testing under conditions that simulate future performance conditions as realistically as possible. This means conducting a mock examination in a setting which not only looks and feels realistic, but also one that creates as many of the same demands, expectations, limitations, and pressures as possible.

## MANY PEOPLE FEAR PUBLIC SPEAKING MORE THAN DEATH

There is a public speaking aspect to providing testimony that is lacking in standard preparation sessions. For a test session to be a realistic simulation, the witness needs to feel the pressure of performing in front of strangers. Counsel can bring in people to observe whom the witness has never met. These observers need not be familiar with the case, nor do they need to provide feedback. What is important is that they not be introduced to the witness, and that their role and purpose for being present remain somewhat a mystery. The less the witness knows of these strangers' backgrounds and role as observers, the more they will begin to feel a level of performance demand akin to testifying in front of strangers.

## WITNESSES HAVE NOT BUILT RAPPORT WITH OPPOSING COUNSEL

In real testimony, the witness is being examined by a stranger. The lack of rapport creates an additional challenge for the witness that goes beyond their experiences answering mock questions from a familiar person. We recommend that counsel arrange for a colleague (preferably one whom the witness does not know) to step in and fulfill the role of examining counsel for the testing phase. As with the unfamiliar observers mentioned above, very little, if any, introduction should be made.

## UNDER OATH THERE ARE NO TIMEOUTS OR DO-OVERS

Finally, actual testimony carries with it very real limitations and obligations enforced by the court. The witness is under oath to tell the truth and their responses are recorded. The witness cannot ask their own questions or seek help from their counsel. In the testing session, counsel should set firm ground rules that there are no timeouts to discuss concepts, no note taking or note reading, and the session will be videotaped, and the witness will be expected to explain and justify any unexpected answers following the test. In combination, these measures serve to create realistic performance pressures because they instill a desire in the witness to "get it right."

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## CONCLUSION

It is too often a surprise who does well and who collapses under oath. It is our experience that much of the uncertainty surrounding witness testimony both in deposition and on the stand is avoidable. Basic skills training sessions typically run from between four to eight hours and require the involvement of both an examiner and an observer. Some witnesses need multiple sessions, and some, depending upon their personality and the difficulty of their testimony may require the assistance of a consultant versed in witness psychology and communication science.

If counsel has multiple key witnesses and limited resources to dedicate to skills training, we recommend they conduct the realistic test (Phase 3) earlier in the process than normal. The idea here would be to crash test each key witness as soon as possible following completion of their initial preparatory education, and after only an hour or two of basic skills training. In this way, counsel can better identify their at-risk witnesses and allocate their limited resources toward the witnesses proven to be most in need.

Witnesses need help acquiring both the knowledge and the skills to be able to testify well, and so there needs to be time spent on preparation and also on training. Yes, it takes time. No, it is not easy. But it will be worth it if the witness can walk out of their deposition or off the stand and say, "I felt like I had seen it all before and knew exactly what to do."