Witness Prep 1
January 10, 2014

The Whole Truth

During my testimony one thought is consistently in my mind: "Is this answer that I am about to give the *whole* truth?" I find that one thought to be an incredibly useful benchmark. It helps me sort through exactly how to answer the question: whether to answer with a simple "yes" or "no"; whether to answer the question but with a clarification; or whether to answer by pointing out a problem with the premise of the question. Under cross a key issue is whether, when, and how to fight. And "fight" is not too strong a word: the issue is how to maintain one's objectivity and credibility on the stand when the questions are designed to expose every weakness, and often are designed to create the appearance of weakness where there is none. The extent to which a cross examiner asks the witness to depart from the whole truth dictates the response.

Perhaps counter intuitively, the issue is the same on direct: the difference is only a matter of degree. No matter how meticulous the preparation for direct, in real life each direct examination takes on a life of its own. Attorneys love to improvise, and generally the flow of testimony in court gives great reasons to do so. In the process questions change, and sometimes get fouled up. In real trials the one thing that will NOT happen is a direct exam that follows the rehearsal.[1] The whole truth is an invaluable benchmark all the time, but especially while ad-libbing.

The whole truth is equally useful in preparing to testify in mock trial. I find, however, that in mock trial the concept of the whole truth is often, and unfortunately, under-emphasized, generally due to reasons that are inescapably built into mock trial. In mock trial the witnesses play roles and "testify" to fiction. Out of respect for actual trials and the real-world witness oath, the mock trial witness oath omits, necessarily, the requirement to testify to a fictional "whole truth."[2] As a result, in mock trial the concept of the whole truth rarely comes up. As a further result, the emphasis in mock trial witness prep is often more on presentation skills and role playing than conformity with the "whole truth" of the mock trial case. This can lead to any number of errors: the witness can be argumentative; or may never give a straight "yes" or "no" to the simplest question; or plays ball with the direct examiner but treats the cross examiner like an enemy. The witness's credibility and score often suffer. Put simply, the concept of the "whole

[1] Admittedly, in mock trial direct exams tend to follow a script more than in real trials—but the top-scoring teams consistently show considerable flexibility on direct, particularly the defense.

[2] Note that the witness oath has been changed and is new this year. The new oath emphasizes conformance with the witness statement, and prohibits adding ". . . material facts that are not contained in the Case Problem . . .", i.e., the oath emphasizes the prohibition of unfair extrapolation. See the Rules of Competition: the witness oath at p. 26; and Rule 6.5 Unfair Extrapolation.

truth" is just as useful for use in mock trial as a mental benchmark to guide testimony as it is in real trials.

Here are four coaching tips for witnesses to keep in mind based on the importance of the "whole truth" in mock trial.

Listening is by far the most important skill for a witness—and it is much more important than presentation skills. One can't tell the "whole truth" unless one has listened most carefully to the actual question—not the question that is expected, not the question that was rehearsed, not the question telegraphed by the attorney during the course of the exam, but the actual question that is asked. Further, one can't tell the "whole truth" until one has carefully weighed and considered the answer against the benchmark of the whole truth. In effect, one must listen to the answer—in effect, rehearse the answer—before it is spoken in order to do this: and this is the most important reason to pause before answering.[3]

The direct examiner is not your friend: the cross examiner is not your enemy, even if it feels like s/he is. Generally, treat each the same.[4] Each may ask bad questions, each may need clarifications, and each may ask questions that require a sharp disagreement—however unlikely that may be on direct. Remember this: witnesses in real trials have a responsibility that attorneys do not, to tell the whole truth—and the jury's principal job is to weigh each witness's credibility. In mock trial the scoring panelists replace the jury, but at some level they weigh witnesses' credibility just as juries do. Attorneys have a different responsibility than witnesses: they put on their client's case within the rules of evidence and procedure. Attorneys present evidence through the witnesses' testimony and argue the case. The witnesses present the facts with as much credibility as they can muster—meaning in conformity with the "whole truth." Witnesses can't argue effectively very often, even though they very often try. Attorneys are flat prohibited from testifying. These differences in functions and responsibilities of attorneys and witnesses should drive different behaviors and attitudes for attorneys and witnesses.

There's no such thing as a perfect case. **There are bad facts in every case.** Nowhere is this more true than in mock trial—the Mock Trial Committee happily writes the cases to be as even as possible, so that neither plaintiff/prosecution nor defense has the slightest advantage. An attempt to hide from, or minimize, a bad fact can result in it being highlighted. When a witness tries to deny, play down or side step a bad fact, the opposing attorney has a fine opportunity to

[3] Many attorneys in real life, and many mock trial coaches, stress pausing before answering in order to give the direct examiner time to object to cross examination questions. Good point. But the more powerful reason to pause is to fully reflect before answering.

[4] In mock trial sometimes role playing requires some flexibility here, but the principle remains the same. In my view, in mock trial the plaintiff and defendant can generally be more emotional than other witnesses, lay witnesses need to present their testimony in such a way that they don't appear so biased that they are not credible, and experts (and law officers and similar witnesses) need to maintain their objectivity and independence to an even greater degree than other witnesses. But each needs to give fair and direct answers to fair questions. See below.

emphasize both the point and the witness's lack of truthfulness by repeating the question or impeaching. Conversely, when a witness easily admits a bad fact, it increases the witness' credibility, and the ease of the admission may deemphasize the importance of the point. Face it, each witness in mock trial has admissions that must be given up—if the questions are phrased skillfully. The key is preparation: know *in advance* what you must give up, what you will clarify, and what you won't give up. In other words, know in advance what the fight is going to be about.

A direct question—whether fair and balanced or not—deserves, even requires, a fair, direct and balanced answer. Here's my guidance: listen to the question most carefully, answer it with the "whole truth" in as few words as possible, and STOP. Oddly enough, stopping seems to be the hardest part. The rarest answers, but sometimes the most powerful, are the shortest: "yes," and "no." Don't temporize over points that you are going to have to give up anyway. Don't argue. State the truth, particularly an admission to a "bad" fact, completely audibly in as few words as possible, and don't give the cross examiner the opportunity to repeat the question and hence stress both the point and the witness's unwillingness to admit to a "truth." As an aside, I note here that sooner or later in an examination you are probably going to be asked a question that requires an explanatory answer, and that's when the witness MUST have the jury's (the scoring panel's) full attention. Set up the long answers with short punchy answers to the preliminary questions. But most of all, be fair, direct and balanced.

– Bill Carey

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Witness Prep 2
January 17, 2014

Subtext

Most people consider themselves to be good listeners. In my experience, however, few truly are. One of the problems is that we seem to recognize good listeners when we speak with them (in other words, when they listen to us), but we seldom define listening skills in detail sufficient to help people improve their skills. Listening skills as a whole is a subject too large to get into here, but mock trial is a very specific environment. In mock trial, what are good listening skills for witnesses? My answer is simple: weigh every word, but listen to more than the words. Hear the ***subtext*** as well as well as the words ***in our own speech*** as well as in that of the attorneys.

First, what is subtext? It is a term that is borrowed from the theater. Subtext is a message which is not stated directly but can be inferred. It is delivered in numerous ways, by the choice of words, tone, expression, posture, gesture, and on and on. Subtext applies in mock trial in that it can show the character and personality of a witness—in a way that adds to the witness's credibility or in a way that detracts from it.

Second, I emphasize listening to the subtext in our own speech because there is often a curious hole in how well we listen. I find that many people, including myself, can be as sensitive as cats to the speech of others, seldom missing a clue or an off tone, but very often do not hear the subtext of our own speech. If you wish to experiment to see if this is true of you, try this. Ask yourself how often you deliver the "You Stupid Idiot" subtext. In other words, how often do you indicate by your tone of voice and choice of words that you are talking down to someone, that s/he is failing to meet your expectations, that s/he is somehow at fault? "You Stupid Idiot" is not in the spoken words (of course not), but tone of voice alone can communicate that thought without words. If your answer is "I don't deliver YSI very often," then ask someone else that knows you very well how often they hear you deliver the "YSI" message. Alternatively, try to count the number of times you hear the YSI subtext during a day, or if you are surrounded by people all day, even in an hour. And evaluate whether the YSI you hear is deliberate and consciously rude on the part of the speaker, or merely unconscious and habitual.

Note that the raw material that student witnesses start with, the witness statements, are chock-full of subtext in the form of loaded words. In other words, the witness statements contain more than the bare facts of what happened. The witness statements also contain subtext, i.e., characterization in the form of word choices. The question for each witness is how to handle that subtext. Here's an example from a mock trial case.

A few years ago, in the Colorado mock trial case of *Sunny Overturf et al. v. Ryanne Seastress*, Sunny's supermodel daughter Keri was shot and killed on the runway during a fashion show by Taylor Overturf, Sunny's twin brother and Keri's uncle. Taylor was shot and killed in turn immediately after by Keri's personal security guard, Jordan Sparkle. Sunny brought a civil suit against Ryanne Seastress, a cutthroat competitor, alleging that Seastress and Taylor conspired in Keri's murder in order to wreck Sunny's business. Taylor's last words were heard by Sparkle, and implicated Seastress. Taylor's last words were also heard by another witness, Pauli Abdone, whose version contradicted Sparkle's and did not implicate Seastress. Here was a factual dispute: who was telling the truth, Sparkle or Abdone?

Sparkle's back story included seven years with the Aspen Police Department, from which he was fired, officially for swiping office supplies, but according to Sparkle because a "new goody two-shoes" in management didn't like ". . . how we detectives were doing things. . ." and framed him with theft. In his witness statement, Sparkle virtually admitted to bending the rules, but he didn't say which rules or how far they were bent. Hence a key issue in any determination of Sparkle's credibility was whether Sparkle was an honorable and honest former policeman, or a fired and discredited rogue cop who would lie about Taylor's last words?

During the first practice of the direct examination of Jordan Sparkle, the question became how best to portray Jordan Sparkle as a credible witness. The student witness testified to Sparkle's background: "I was a cop for the Aspen Police Department for seven years. . ." Regarding Keri's murder and the subsequent killing of Taylor, the witness testified that: "I didn't see Taylor shoot Keri, but I heard the shot, and turned to see Keri down, bleeding all over the place, with Taylor standing over her waving a gun around at the crowd. So I pulled my gun and shot him!" The witness's initial reaction was that the testimony was fine because it was dramatic and consistent with the witness statement. But what is the subtext of the witness's choice of words?

Let me ask you this: would a seasoned, professional, credible law enforcement officer ever refer to him/herself on the stand as a "cop"? Would s/he ever say, "So I pulled my gun and shot him"? What do the witness's words say to you about the professionalism and honesty of the character? During a discussion with the students, it developed that the answers to these questions were "no," "no," and "nothing good." A reputable police officer might testify something like this:

> I heard a shot very close by, then saw the fatally wounded victim fallen to the ground and bleeding profusely. I saw Taylor Overturf standing over the victim with a gun in his hand pointing it at the crowd. I saw that there was clearly an immediate and deadly danger to the public safety, drew my firearm, determined that I had a clear shot that did not endanger the public, and took the shot, hitting Overturf.

In contrast, the words "I pulled my gun and shot him," *sound* unprofessional. In other words, the ***subtext*** of "I pulled my gun and shot him" says "I am (or might be) a rogue cop. I am certainly not a professional police officer." In this instance, the student witness's first effort at testimony was consistent with the witness statement, but the subtext of his choice of words tended to undercut his credibility. Note that the alternative words "I drew my firearm. . ." are equally consistent with the bare fact as stated in the witness statement. The words differ, the characterization of the fact is different, but the fact is identical. In effect, the witness had a choice as to how to play the character, and unknowingly picked a less credible way.

There are additional subtext keys in the witness's choice of words. In police language, particularly in formal settings such as a trial, police don't carry "guns" (unless it is a shotgun). In the mind and language of the police, bad guys carry "guns", which have never been cleaned and are gummed up such that they may not work well, are probably rusty, have been so abused that they rattle if you shake them, and might even be dangerous to shoot. Taylor Overturf (the murderer) used a "gun." Police, on the other hand, carry "firearms"—for public safety and personal protection, which are lovingly cleaned and maintained after every weekly practice because, after all, lives might depend on them.

Here's the point. Virtually every word and phrase used by a witness carries a subtext, unheard by some, subliminal to others, and screaming to yet others. Ditto with tone, expression, posture and gestures. Listening skills are more than just hearing and retaining what others say. In mock trial, listening skills are more than carefully listening to the question. Listening skills encompass understanding the diversity of the environments in which we operate, the diversity of our listeners, and sensitivity to how our character will be understood, and may be misunderstood. In short, weigh every word, tone, expression, posture and gesture with subtext in mind.

Bill Carey

Thanks goes to the student in this story, Griff O'Brien, then a freshman, who went on to earn individual witness awards at the Regional and State Tournaments that year, was a star witness at CA for four years, and is now at Duke. Thanks also go to Tia Rebholtz, one of my colleague coaches at CA, for the introduction of the term "subtext."

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Witness Prep 3
January 24, 2014

Top 10 Coaching Tips for Mock Trial Witnesses

1. Be true to the **Whole Truth**. You must believe what you are saying. There are **bad facts that are unavoidable** in every case: give 'em up rather than sound defensive or argumentative. Once upon a time there was a legal doctrine named "*Falsus in uno, falsus in omnes*": "False in one, false in all." It used to be a jury instruction, but is no more. The concept, however, is useful to keep in mind. Remember: **"Conceal a flaw, and the world will imagine the worst."** (Martial, c. 100 A.D.)

2. Prepare, prepare, prepare! And it is not enough to simply memorize the witness statement. You must prepare properly!
    a. Even though it doesn't feel like it, the witness **is ultimately in control if s/he is properly prepared.** The most powerful people in the world fail as witnesses if they don't prepare properly. It is natural to feel uncomfortable with the question/answer format: **feeling disconcerted and out-of-control is normal! But THE WITNESS HAS ABSOLUTE CONTROL of her/his ANSWERS. No one but the witness can control either the answers or the attitude!** So take and maintain control of what is yours, including the pace! Attain this through **preparation & practice. Practice does not make perfect. Perfect practice makes perfect.**
    b. Prepare both the facts and their characterization.
        i. Mock trial is a special environment: the witness statements are loaded with more than just facts, they also are loaded with characterizations that operate to undercut the witnesses' credibility. This gives the cross examiners lots of ammunition.
        ii. So **be sure of nuances, fine distinctions, and weak and strong inferences, and be able to articulate them EXACTLY**. Be so well prepared that there are no surprises, and that you have thought things through to such an extent that **THE TRUTH IS YOUR SHIELD! Know the exact boundaries of what you are going to give up and what you are going to defend!** (For example, saying that "Everyone liked him except me" does not necessarily mean that "I don't like him." Think about it.)

3. Good testimony starts with listening to the question. **LISTEN, LISTEN, LISTEN!!!** Understand the question exactly and literally. Note that listening skills cannot be developed only for the courtroom. Either you've developed the skills outside the courtroom or you don't have them. Most people are much more intent on being heard than in listening.

4. Answer the question **completely** and **completely balanced** in as **few words as possible**, and **STOP**!
    a. For direct: prepare a script, know it well enough to tick off each point easily (do NOT learn the script by heart), then destroy the script and follow the flow in court. Otherwise you will not be able to listen effectively, nor have the flexibility to respond if others' evidence doesn't come in as you expect it to. The examination will take on a life of its own. Go with it. Depend on counsel to keep you on track. No matter how well one rehearses, direct NEVER goes as planned.
    b. On cross: The typical recommended process for answering during cross is Listen, Pause for possible objections, and Answer the question. Note that this is an attorney-centric directive: i.e., the pause is for the *attorney to jump up with an objection,* and is not primarily a benefit to the *witness*.
        i. Remember: the essential use of the pause is to sort out BOTH **the whole truth** and **its presentation**, and NOT merely to wait for a possible objection.
        ii. **Talking ≠ Control!**

            Effective PAUSING, silence, is often more effective. Talking too much and too fast is normally a sign that the witness may be veering out-of-control. A pause, however, shows confidence, increases the audience's tension and anticipation, and emphasizes what the witness is about to say. Use pauses effectively.
        iii. This does not mean that the witness should never pause and wait for an objection. The most effective way to do that, however, is to **know the possible objections, and pause and wait after bad questions** for the proper objection. This is more effective than waiting after each and every question as it creates a more natural flow. The most effective witnesses know the rules of evidence as well as the attorneys do.
    c. Anticipate the next question, (that's normally a good thing), but DO NOT extend your answer to talk about it!
    d. **The characterization of the whole truth is a matter of presentation**. Determine in advance the characterization of the witness and the facts **that will be most credible**,

taking into account the nature of the character the witness is playing. Then, craft the language of the answers to suit both the whole truth and the character.

e. On cross, make the attorney ask precise and exact questions. A high percentage of your answers on cross should be: "yes," "no," "I don't know," I don't remember," "I don't think I understand your question…"

5. Don't argue with counsel. Beware the dueling monologues! DO NOT respond to provocation. For the most part, don't use any poor-sounding tones of voice, such as **"You stupid idiot…"** **Don't try to score TOO MUCH on cross: let counsel handle most of that on re-direct. Keep your answers short and to the point. (But, if the attorney gives you a shot by asking an open-ended question, take it.)**

6. Make sure that as a result of your testimony there simply cannot be any misinterpretations or misimpressions.

7. Find your own way to **balance the requirements of numbers 4 to 6**, above.
   a. Be prepared for character assassination by the cross examining attorney's use of innuendo and tone of voice (**"You stupid idiot"** may figure prominently), displays of anger, etc.—and don't fall for it, don't get defensive. Defensiveness can sound like argument, whining, evasiveness or lying.
   b. **Treat counsel for both sides identically. Neither counsel is your friend, neither is your enemy**. You are under oath, they aren't. Both will pose questions that require clarification.
   c. Remember especially to treat the cross examining attorney ***as if s/he were your very favorite sister's genius child. You would never use the "you stupid idiot" tone of voice because, after all, s/he is a genius and is a child. Be kind. But you also would not let the child leave with any possible misunderstanding because, being a genius, the child just may do harm to him/herself as a result of a misunderstanding.*** A careless discussion about baking soda could result in blowing up the kitchen. **Be firm, but have patience.**

8. **Speed detracts from articulation. The more important the point, the more difficult the point, the more deliberate the witness (and direct examining attorney) need to be.** As a result, there will be natural changes to the pace of your testimony. Slow down when you sense a need to be careful, or for emphasis. Same thing for volume/projection: get a little louder. The temptation is to speed up in order to get it all said. Do Not Succumb!

9. **Don't get "rolled" by opposing counsel:** rushed into a string of quick answers. Adrenalin has a tendency to accelerate the pace of answers. If the cross-examining attorney interrupts your answer with another question, even slightly, **DO NOT GET ROLLED, but DO NOT talk over the attorney. OWN THE PACE,** but own it tactfully.
    a. When you are interrupted by counsel while answering, let counsel finish the new question, then ask, sincerely, if you may finish your answer to the previous question. If the question was complex, or if you can't remember where you were in your answer, start the answer from the beginning, or ask for the previous question to be repeated.
    b. If you aren't permitted by the judge to complete your answer to the prior question, then ask the attorney to re-state the new question.

10. **Key Words, Phrases, Figures and Techniques** to consider using in testimony
    a. "**Not exactly**."
        i. When counsel asks a question that has an assumption buried in it that is not fair, consider using "Not exactly" to put the onus on that counsel to fix the question, without arguing it with him/her. If it happens on cross and counsel does not fix the question, then you have given the attorney the opportunity and your subsequent disagreement will appear more reasonable. In any event, the words "not exactly" signal the direct attorney to come back to that point on re-direct.
        ii. If the question is very bad indeed and clearly unfair, as in "Mr. Witness, have you stopped beating your wife?" then you may answer with something like, "I just can't answer the question the way you asked it." But it has to be a very bad question to go that far. If it is not in response to a very bad question it may well sound evasive.
        iii. Be alert for opportunities after you answer "Not exactly," or "I just can't answer the question the way you asked it." Opposing counsel may well goof, and ask "What's the matter with my question?" or "Why not?" Be prepared to blast though any open door or any open-ended question on cross.
    b. "**Inference**," "**reasonable inference**," or "**the most reasonable inference available given these facts…**"
        i. Speculation is of course forbidden.
        ii. Opinion testimony is allowed only in certain circumstances.
        iii. Still, at times a witness can testify to what they think or thought, for example a present sense impression. If the present sense impression is not in fact a smoking gun, then labeling it a reasonable inference may get it in while getting the witness credit for a balanced, thoughtful answer.
    c. Most people new to speaking in public prepare presentations as an essay, and this results in text that sounds like it is being read, and is forced and unnatural. Learn how

to prepare testimony by writing a text that will work when spoken—prepare your direct testimony in speaking phrases complete with breaths/line breaks at all the appropriate places. This helps memory. Then throw it away and testify cold. This results in a more natural flow.

d. If the cross-examining attorney makes the mistake of asking an open-ended question, run with it. Give him, the Court, and the jury the full benefit of a complete repetition of your direct testimony, to the extent it is responsive to the question.

Bill Carey

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