



THE 3 STEPS AND 10 C'S FOR CREDIBLE TESTIMONY

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The following material is a summary of Chapter 7 and Chapter 9 of Dr. Spaeth's 4 hour CLE program, published in a DVD set in August, 2010, with the American Bar Association ("Strategic Witness Preparation"). In addition, this material is a portion of two DVDs designed for witnesses to view prior to testifying, titled "You Will Be A Credible Witness At Your Deposition!" and "You Will Be A Credible Witness At Trial!" These DVDs were published by the American Bar Association originally in August, 2008. They were published as a Second Edition in May, 2012, which now includes subtitles in Spanish and Chinese. Handouts with the following information are provided with these DVD sets.

Witness preparation can be a complex task from both a legal and communication perspective. This is especially true when witnesses are fearful, inexperienced, angry, controlling and/or inattentive. Because most witnesses have not testified before and are nervous, they typically need guidelines and instructions.

We assume that witnesses know the following points without being told because they are based on common sense, but experience has proven otherwise. Because witnesses are often consumed with questions, concerns, and agendas, and they seldom consider the 3 Steps and 10 C's of Credible Testimony *prior* to testifying. Consideration too often takes place *after* testifying, after mistakes have been made!

The following points can be considered the "do's and don'ts" for credible testimony. The following checklist can be very effective in preparing lay witnesses and clients for either depositions or trials. We have found that most witnesses are grateful and relieved to have these shared with them. The purpose of this information is to help witnesses feel more confident, prepared and comfortable in giving their testimony.

It is also recommended that this material be prefaced with the following statement to witnesses: *Nothing we cover in this material is meant to have you do anything but tell the truth, the whole truth and nothing but the truth in your testimony.*

The 3 Steps for Credible Testimony

Listen, Think, then Answer

It is critical to explain this sequence to witnesses, who will often answer *before* listening carefully and thinking! Witnesses falsely believe that they must have immediate answers to questions, although this is not expected in normal, everyday conversations. They need to be advised otherwise. Emphasize these 3 steps and their order of occurrence; listen, think, *then* answer.

Step 1, Listen!

Witnesses often need specific direction and practice on what it means to listen, especially if they are not experienced in testifying. They begin conjuring up answers before the question is even finished.

It is imperative to advise witnesses to:

- ✓ take a pause to ensure they understand the question
 - ✓ not interrupt the questioner
 - ✓ not rush their reply
 - ✓ stop for objections

These all require conscious focus and attentiveness on the part of witnesses. Witnesses need to know that jumping to conclusions, or assuming what the question will be, can cause them to answer the wrong question and “open a can of worms”! This will require them to answer questions that otherwise would not have been asked.



Step 2, Think!

The second step, think, seems obvious but is often underused by witnesses.

Advise witnesses to:

- ✓ *never* answer a question before thinking about it
- ✓ make sure they fully understand the question before replying
 - ✓ ask for clarification if the question is not clear

Assure witnesses that they can *politely* ask for clarification. Advise witnesses against giving bossy instructions, however, such as “You *need* to rephrase that question”.

Ask witnesses to watch for words that need explanations, such as “Are you *familiar* with this document?” What is meant by familiar? Writing it? Reading it? Seeing it in passing? A “yes” answer could suggest the witness has carefully reviewed the document and is prepared to discuss it when this may not be the case. Witnesses will need to ask for explanations with some words.

Also advise witnesses to watch for long or confusing questions, or two questions in one. Give the witnesses examples of these, and ways to ask for clarification or respond to these. For example, the question “Did you see Beth last May and did you talk to her about this case” A

correct answer might be "I did see Beth last May, but did not talk to her about this case." A simple "yes" response might provide wrong information, and make it difficult for the witness to retract this later.

It is also imperative that witnesses understand that every question is an important one so that they do not become lax or inattentive while testifying.

Step 3, Answer!

In addition to responding before thinking, the most common mistake witnesses make in replying to an answer is to answer beyond the original question. An example would be giving place of birth and where they went to school when only asked for a birthdate!

Among other things, advise witnesses to:

- ✓ answer only the question asked of them
- ✓ avoid "never" or "always" claims when they can backfire
- ✓ ask to explain if a question cannot be answered by a simple "yes" or "no".

Show witnesses how to turn a "trick question" (*Do you still use illegal drugs?*) into a sentence that accurately reflects the truth (*I have never used illegal drugs.*) Inform witnesses that "Never" could be used here only if it is the truth and cannot be disproven!

The 10 C's for Credible Testimony

After discussing the "3 Steps" for credible testimony with witnesses, it is important to focus on the "10 C's". A brief summary of these will be covered here.

Be Candid

Share with witnesses the pitfalls of getting caught in a lie, and the damage this can cause to their credibility. Witnesses often underestimate both the likelihood of being caught in an untruth, and the negative consequences!

Instruct witnesses to:

- ✓ always tell the truth
- ✓ don't make up answers
- ✓ don't be evasive

Witnesses often erroneously think that they are helping the case by fabricating data!



Also, witnesses need to know that even if they don't like the answer to a question, don't hedge. Explain that people are more likely to believe witnesses who answer tough questions honestly and directly, rather than evasively. This is also a good time to inform witnesses that if they have important information that they have not shared with their attorney, now is the time to do so. Emphasize that attorneys do not like surprises when their witnesses are testifying!

Be Competent

Let witnesses know that while they won't be expected to memorize every date and detail, they will be expected to be competent and informative regarding the case issues.

Advise witnesses they should:

- ✓ know the case facts
- ✓ review documents in advance to refresh memories.

Witnesses could appear uncooperative, indifferent or uncaring if they do not know information they *should* know.

Be Concise

Let witnesses know that observers are most impressed with witnesses who can respond concisely to questions.

Advise witnesses to:

- ✓ keep their answers short
 - ✓ avoid rambling
- ✓ stay focused only on the questions asked.

Explain that witnesses should usually answer questions with a "yes" and "no" when they can, and/or respond with only a few sentences. Doing so also allows counsel to direct the questioning and ask for more information only when desired.

Explain that witnesses will likely give longer, more detailed answers with their counsel, however, than with opposing counsel. Attorneys do not want to have to "pull" words out of their own witnesses when explanations are desired!

Be Certain

Advise witnesses to:

- ✓ not guess at an answer
- ✓ say "I don't know" when necessary
- ✓ make their level of recall clear

Ask witnesses not to be uncertain when they *are* certain, and not to be adamant when unsure! Witnesses need to differentiate between data they know well, data they know somewhat, and data they don't know at all. Witnesses need to be assured that it is okay to say they don't know.



Witnesses also need to be instructed, though, to be helpful if they have a general idea. An answer such as "I believe it was between 10 and 20 times, but I'm not certain" will make a witness look cooperative without locking in a damaging or incorrect answer. I've seen negative reactions from jurors when witnesses answer "I don't know" to extreme questions such as "Well, did you talk to him over 1,000 times last week?"

Be Courteous

Witnesses need to understand that being polite, courteous and respectful at all times is necessary in their testimony.

Advise witnesses to:

- ✓ maintain the same attitude with opposing counsel as their counsel
 - ✓ politely answer every question asked unless instructed not to
- ✓ not answer a question with a question unless honestly asking for clarification.

Sometimes witnesses will answer a question rudely, such as "Why do you need to know that?" Unless their counsel objects, witnesses need to know that they must *politely* answer *all* questions asked of them.

Be Confident

Inform witnesses that their testimony will have more credibility and impact if they speak with confidence, conviction and energy. People believe those who speak confidently over those who speak hesitantly or anxiously.

To appear confident, advise witnesses to:

- ✓ maintain good eye contact
- ✓ sit straight with good posture
- ✓ keep hands folded on a table or lap
 - ✓ talk loudly
 - ✓ speak clearly
 - ✓ avoid fidgeting

Instruct witnesses not look at you or others for guidance or answers. No one can answer questions for them. Also, inform witnesses that being confident does not mean being cocky, argumentative or arrogant. These traits will come across negatively. Again, witnesses can be confident and still be respectful.

Be Consistent

Witnesses need to understand the importance of being consistent in their answers. Others are suspicious of discrepancies in testimony.

Advise witnesses

- ✓ not to change prior answers when possible
- ✓ to discuss any anticipated changes with their counsel before testifying.

Also educate witnesses on the importance of consistency between words and body language. Inform witnesses that if their gestures contradict what they are saying, it suggests that witnesses are not being truthful.

Be Composed

During testimony, witnesses need to remain calm and composed. This can be hard to do as lawsuits are often stressful. Witnesses need to know that it is the opposing attorney's job to confuse and upset them so that they give answers that can be used against them. It's nothing personal, it's just part of the opposing attorney's job.

Advise witnesses to:

- ✓ keep their cool during testimony
 - ✓ avoid showing anger
- ✓ take the proceeding seriously and avoid laughing, joking or sarcasm
 - ✓ be respectful if watching other witnesses testifying
 - ✓ keep physical reactions to a minimum.

Be Clear

Witnesses need to be clear in their communication.

Advise them to:

- ✓ avoid mumbling
- ✓ avoid talking too fast or too slowly
- ✓ answer in words, not gestures or nods
 - ✓ avoid swearing or slang.

If they talk too fast, listeners may not understand everything told to them. If witnesses talk too slowly, listeners will lose interest. Extremes in pitch should also be avoided. Witnesses should avoid thinking out loud while formulating answers. Responses have more impact when given directly.

Be Conservative

Witnesses' ideas of conservative dress can vary considerably from counsels'! It is important for attorneys to discuss appearance with witnesses.

Advise witnesses to avoid:

- ✓ bright colors or loud patterns
- ✓ shorts, t-shirts or tank shirts
- ✓ tight or suggestive clothing
- ✓ flashy jewelry or membership pins
 - ✓ heavy make-up
- ✓ unusual hairstyles or colors
 - ✓ gym clothes
 - ✓ hats or sunglasses
- ✓ shorts, jeans and tennis shoes.

It is recommended that beards and mustaches, if present, be short and trimmed professionally. Witnesses will want to present as normal as possible so the average person can relate to them. Ask witnesses to wear what they might wear to an important job interview.

Conclusion

Reassure witnesses that they will not have to memorize all of the information provided here! It will be helpful to them, and will come to mind when they need it.

Advise your witnesses not to dwell on an answer they didn't like. Put it behind them and go on to the next question. State that most witnesses are not perfect, and not everyone is completely

satisfied with their testimony when done. This is normal. Let your witnesses know that people usually do better when testifying than they think they will. Show confidence in your witnesses. Assure them that if they are sincere, respectful and thoughtful, they *will* be credible in their testimony!

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