HOW TO PREPARE FOR CROSS EXAMINATION

Ian T. Ramsey[1]
Stites & Harbison PLLC

Being an effective witness requires knowledge and patience that can only be achieved by preparation and supportive assistance from experienced counsel. This guideline is an aide to assist you with formulating your preparation strategy and never a substitute.

Although testimony under oath can occur in a variety of ways, the two most common are in a pre-trial deposition and during trial in a courtroom.

The principal distinction between deposition testimony and a courtroom appearance is that a deposition is not likely to be your one and only chance to state your point of view. Courtroom testimony usually is just that, your last and best chance. This distinction gives rise to a crucial difference in preparation.

For courtroom testimony, you and your attorney will thoroughly prepare every fact, document, exhibit, visual aid, and well-turned phrase. It is an all-out effort. You use all your shots and save nothing.

A pre-trial deposition taken by the other side is different. It is not your one and only opportunity to vindicate yourself or your company. Later you will get your chance. You have to show skill, agility, and savvy. You cannot ignore any of these and make a good showing.

[1] Ian T. Ramsey is based in the Louisville, Kentucky, Office, a Certified Fire and Explosion Investigator, and a member of the Firm's Torts and Insurance Practice Group.

Use of Pre-Trial Depositions at Trial

When you are questioned at a pre-trial deposition, the attorney questioning you has three objectives:

• **Obtain Statements of Fact.** This is the who, what, when, and where part of your testimony. Sometimes opposing counsel asks you "why," but not as often as you think.

• **Obtain Admissions Damaging to Your Position.** Some of your factual statements might be admissions that hurt your position in the case. Opposing counsel will try to get as many damaging statements as possible and you will see them again at trial. Remember, getting you to admit something against your interest is not necessarily done with fire and brimstone. The most devastating admissions can occur with an offhand answer to a seemingly casual question. Read your deposition again, carefully, to see if you made any admissions against your interest and bring them to the attention of your attorneys.

• **Get You To Contradict Yourself.** Creating a clear contradiction in the testimony of a witness is called impeachment. A witness can be impeached by his own statements, by the statements of others, and by documents. You cannot control being contradicted by others, but you certainly can control contradicting yourself.

The first two objectives, aimed at getting factual statements and prying out damaging admissions, are largely a function of the facts and circumstances of the case. At trial, you have to know the facts of the case in order to defend yourself.

As for the third objective, when you contradict yourself, you commit a serious error regardless of the facts of the case. A determined lawyer can make an inconsistency tantamount to a lie.

Preparing For Testimony

The key ingredient in becoming a good witness is spending the time necessary to be well prepared.

If you are conversant with the facts, show mastery of the technical details, and speak with controlled confidence, you will make an important contribution to the outcome of the case.

It is very unlikely that your testimony as one witness among many will be THE cause of the outcome of the trial. A good impression, however, builds confidence towards those that follow you, while a poor impression will always leave doubt with a judge or jury.

To assist with preparation, read all your records and notes, and go over them with your lawyer. Respond to your lawyer's requests for additional research, articles, or other documents. The higher the stakes, the more time you need to spend on preparation.

Another important ingredient in being a good witness is a willingness to accept constructive criticism. A videotape can be your friend. If the situation justifies it, read your deposition answers in front of a camera and critique yourself. See yourself as others see you and soon you will learn the importance of thorough preparation.

Rules of Thumb

Assume now that you are ready to testify. You understand opposing counsel's three primary objectives. You have read and re-read the documents, spent appropriate time with your lawyer, and understand the intricacies of the case.

What you need now are a dozen concrete rules to follow during cross-examination. They are:

1. **Tell the Truth directly to the Finder of Fact**. You come to a bad end if you do not tell the truth. No matter what you may think in the panic of the moment, telling the truth is always best. Give your answer directly to the Finder of Fact (whether it is a Judge or a Jury). Make eye contact. Don't give your answer to the attorney questioning you. You are not having a conversation. You are attempting to persuade the Finder of Fact, not the opposing attorney.

2. **Beware the Power of Language**. The truth can be told in many ways. For example, you can testify that the consultant you hired was "cheap," or you can testify he was a "bargain." Underlying both statements may be the fact that you paid only $5,000, but there is a big difference in the connotative meanings of the two words. If you thoroughly understand the facts and issues about which you are called to testify, you won't say "cheap" when what you really mean is "bargain."

3. **Demand Clear Questions**. If you do not understand a question, ask for clarification. Also, wait for the question to be finished. It may be okay in cocktail conversation to finish the other guy's thought for him, but do not do that in a trial.

If you find yourself beginning your answer with, "What I think you mean is ... ," or "Do you mean x or y?" you are breaking this rule.

4. **Pause Before Answering**. Some people think and talk faster than others, but snap responses are rarely sound responses. Besides, your lawyer may want to make an objection to the question. Give him or her a chance to do so.

5. **Answering the Question Directly**. A direct answer should start with "yes," "no," "I do not have that information," or even "I don't recall." Judges and juries are uncomfortable with witnesses who dodge the questions. If you find yourself saying at the end of an answer, "So I guess my answer probably
is ... ," you are breaking this rule.

6. **Do Not Volunteer Information**. This rule applies primarily when you are being questioned by opposing counsel, but take care not to give your own lawyer an unpleasant surprise. Many yes or no answers require some explanation so that the yes or no makes sense. Your goal is to limit your

explanation to what is necessary to make the answer understandable on its own. When you have done that, stop.

7. **Never Guess or Speculate**. You are seldom in jeopardy when you say "I don't know" or "I don't remember." Do not carry this to an extreme, however. In other words, do not say "I don't know" when you mean "I could tell you the answer if you let me read my deposition testimony that you are quoting from."

8. **Distrust Leading Questions**. A leading question suggests its own answer. For example, say you're asked: "You know that recommended practice is to inspect the weld every six thousand hours or six months, don't you?" Before you answer, ask yourself: Recommended by whom? Inspect in what way? Six months maybe but not six thousand hours. In other words, weed out those parts of the question with which you disagree. Tell the questioner you disagree. You do not want to be argumentative, you simply need to be careful.

9. **Read the Documents**. Never answer any question about any written document without taking all the time you need to review the document, determine who wrote it, when it was written, and why. If necessary, ask for a brief recess. Also, be wary of pronouncing any book, article or author "authoritative."

10. **Don't Be Fooled by Repetition**. Your answer to a given question should be essentially the same even if the opposing lawyer thinks of ten different ways to ask it. This is a favorite technique for getting you to contradict yourself. The questioner is relying on the very human trait of uncertainty under pressure. Be ready to be firm.

11. **Listen to Your Lawyer**. If your lawyer objects to a question, listen to what he or she says. Don't agree with opposing counsel's suggestion that the question is clear if your lawyer has just said that it is unclear. Also, if your lawyer instructs you not to answer the question follow that advice.

12. **Be Courteous and Stay Under Control**. You should remain courteous and controlled at all times. If you become sarcastic or lose your temper, you likely will regret it later.

NOTES: