UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

2017 Winning at Deposition: Skills and Strategy

August 24, 2017
Austin, Texas

Witness Bill of Rights

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Witnesses are like the rest of us. We perform better when we are in control and know that we are in control of our situation. The single most important thing for witnesses to understand in order to be effective is that they are in control.

Lawsuits are a game about credibility. Witnesses are more credible, more believable, when they exude competence and confidence, and witnesses exude those things better when they are in control than they do when they feel the fear and angst of being out of control.

Perhaps there is no better evidence that witnesses are actually in control of the situation, rather than the lawyers who are asking questions, than the degree to which we have gone to create the illusion that the judge and/or lawyers are in control rather than the witness. Study, for example, the typical courtroom. The judge is in a black robe and sits high on a bench with a government seal immediately behind him and a flag on either side. He is protected by a uniformed officer, complete with gun. People in the courtroom rise when he enters the room, and address the judge as "Your Honor." Lawyers address the court in their own vocabulary and have the respect of the court, as "Officers of the Court." They get to select what questions to ask and can readily berate the witness if they disagree with the testimony. They can even ask the judge to admonish the witness if they are dissatisfied with the witness' answer and can move to strike answers they deem to be non-responsive.

The witness, on the other hand, sits slightly in front of and below the judge such that if the judge addresses the witness, the witness must turn and look over his or her shoulder, up and back toward the judge. Only the witness is placed under oath, subject to the penalty of perjury. The lawyers, who do most of the testifying, at least on cross-examination, are under no such oath, are free to lie, and regularly do. Someone coming into that setting being totally unfamiliar with it would immediately conclude that the witness is totally out of control and that the situation is being run by the judge with the help of an armed policeman and lawyers who are friends of the judge. If, in fact, witnesses are not in power and not in control, why would we have gone to all that trouble to create the illusion that the witness is not in control? The answer is, of course, that the witness is in control and that the entire layout and process is designed to hide that fact from the witness. Why would he spend all of that money to create a "set" that communicates to the witness he is totally powerless?

In order to convince witnesses of the truth, that they are in control and thereby free them up to be effective in their testimony, witnesses need to understand that they have meaningful powers and rights. I call these the "Witness Bill of Rights."

I recite the Witness Bill of Rights, below, not in any particular order. The order can be shuffled and rearranged, depending on the circumstances. But, I believe, each and every witness, including experts, should be educated on these important witness powers.

1. Witnesses have the right not to know the answer to questions. Many witnesses feel that saying, "I do not know," is a sign of weakness. Experts, in particular, have a hard time saying, "I do not know," which in expert parlance, is typically said as, "I do not have an opinion about that." My favorite way for witnesses to express this thought is "I am sorry, I cannot help

you there," thereby educating the listener that while the witness is indeed trying to be helpful, he simply cannot help on that particular point. That is particularly useful when the witness has already answered the question and is indicating that he can be of no "additional help."

Far from being a "weak" answer, "I don't know" completely stops the lawyer, cold, because it insulates the witness from any further questioning on that topic. The lawyer cannot complain to the judge that the witness should know and should be made to know. If the witness does not know, the witness does not know, and the lawyer must simply move on. The answer, "I don't know," therefore, lowers a protective shield around the witness that no lawyer bullets can penetrate. It is a safe base, a safe haven for witnesses. And, because the witness, in fact, does not know,[1] that ends the inquiry and is therefore a safe haven for the witness.

2. The witness has the right not to accept faulty assumptions that are built into the question. Knowing that the witness has the power, and right, to formulate the answers, lawyers have developed several techniques to try to take that power back, and exercise it themselves. One way lawyers do that is by testifying through their questions. One principal method of doing so is to build factual information into questions that support the lawyers' position. Many of these are either faulty, as in completely untrue, or they are simply not supported by the facts, and, thus, are not known by the witness to be true. Often, these "facts" are inserted by the lawyer at the outset of a long question, or are buried in the middle, and often have little relevance to the actual question or the answer that is being solicited. Many times, the witness, intent on answering the question, ignores the faulty assumption, and simply answers the question as if the assumption were not in the question. The effect of that, however, is to cede the power to formulate the answers, which is the exclusive province of the witness. The witness has the absolute right not to do that.

As with all powers, there is a concomitant duty. Because witnesses have the power not to accept faulty assumptions built into questions, they have the duty to refuse to do so. They can either confront the questioner with the faulty assumption, identifying it with particularity and explaining why it is false. They can ask that the question be repeated. Often the lawyer simply omits the faulty assumption, realizing he has been "caught." The witness can say that he does not know whether the fact inserted into the question is true or false. The witness can tell the lawyer he cannot answer the question as phrased because of the faulty assumption. Finally, the witness can simply rephrase the question, omitting the faulty assumption and answering that question, "I assume what you are asking me is, 'X,' and the answer to that is, 'Y.'" Whichever technique is used, the witness has the right not to answer questions with imbedded faulty facts, and has a corresponding obligation not to do so.

3. The witness has the absolute power to control the demeanor of the deposition. One would think that the lawyer has that power and can control the demeanor of the deposition by being rude, or strident, or accusatory to a witness, for example. Because a properly prepared witness knows of his own power, he knows that it takes two to engage in that kind of conduct. He also knows that if the witness does not respond in kind to the lawyer, the lawyer must

[1] Witnesses, of course, are told to tell the truth and saying, "I don't know" when in fact they know, would not be true. It is presumed, therefore, as with all other rules, that the witness is answering truthfully.

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