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By Michael K. Callahan

Litigation Frenzy: Navigating Social Inflation and Nuclear Verdicts

Michael K. Callahan is assistant general counsel-litigation at Eversource Energy in Boston, Massachusetts. He is the first Vice Chair of the DRI Corporate Counsel Committee.

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Litigation Frenzy: Navigating Social Inflation and Nuclear Verdicts

When I think about the recent trends in litigation, including social inflation, nuclear verdicts, and the anti-corporate attacks spewing from the plaintiffs' bar, I am reminded of the memorable words of anchorman Howard Beale in the 1976 film Network: "I'm as mad as hell, and I'm not going to take this anymore!" The increasing use of scare tactics and attorney advertising to recruit clients and influence potential jurors along with the proliferation of "innovative" class action lawsuits has resulted in a litigation frenzy.

No one can dispute that the goal of the trial system and juries is to provide fair and reasonable compensation for those people who have been injured because of the negligence of the defendant. To be sure, many cases involve catastrophic life-long injuries or death, for which there should be fair and reasonable compensation based upon fault. The question becomes what is fair and reasonable under the circumstances.

The term social inflation generally describes a trend of significant increases in verdicts and costs associated with civil litigation that exceed general economic inflation without a demonstrable change in legal or factual bases to substantiate it. Similarly, the term "nuclear verdict" is generally defined as verdicts of $10 million or more. The unpredictability of verdicts can have a devastating impact on business and even entire industries.

According to a study of verdicts between January 1, 2013, and December 31, 2022, by the US Chamber of Commerce Institute for Legal Reform published in May 2024, approximately half of nuclear verdicts during this period were between $10 million and $20 million, and over one-third were between $20 million and $50 million. The remaining 19 percent of nuclear verdicts exceeded $50 million, a group that included 115 verdicts of $100 million or more. The study also stated that the median nuclear verdict in product liability cases peaked at $36 million in 2022 while the mean nuclear verdict overall was $89 million. Four states—California, Florida, Texas, and New York—accounted for half of the nation's nuclear verdicts.

Excessive, or "nuclear," verdicts are fueled by a variety of factors both inside and outside the courthouse. The plaintiffs' bar has been known to use tactics that draw upon jurors' fear, bias or anti-corporate sentiment to inflate damage awards. Many states permit plaintiff's counsel to float an exorbitant damages number to "anchor" an award. Third-party litigation funding, attorney advertising, and general anti-corporate bias can also influence jurors.

These litigation trends result in higher business costs, including higher insurance premiums and, in some cases, the limitation or elimination of certain insurance coverages. Many businesses face being priced out of the insurance market altogether. Unbeknownst to jurors, the impacts of excessive verdicts and the increased business costs, can impose a substantial increase in consumer costs for everyday items and services.

How can we address some of the challenges raised by the plaintiffs' bar and the risk of nuclear verdicts? While there are no silver bullets, a commitment to messaging and sound defense tactics is critical. This includes looking for opportunities to encourage civil justice reforms, seeking disclosures of third-party lending, advocating for "good science" in the court room, and addressing some of the tactics used by the plaintiffs' bar such as anchoring and using sound jury selection to identify those jurors who cannot objectively decide the case and render a fair verdict.

DRI has multiple Substantive Law Committees (SLCs) whose members can provide support and guidance to navigate your way through these issues. ***Visit DRI's website*** to identify the SLCs that can support your needs. DRI's ***Corporate Counsel Committee*** is comprised exclusively of in-house counsel, many of which are facing these same challenges. Additionally, ***DRI's Annual Meeting*** will be held in Seattle on October 16-18. At the Annual Meeting, you will have an opportunity to hear from and learn from experienced practitioners who can provide guidance. At the same time, you can avail yourself of numerous opportunities to network among peers and civil defense leaders to connect with top attorneys from all over and develop contacts and relationships you can call upon when needed.

Unfortunately, if you aren't currently dealing with a case or counsel that presents a potential nuclear verdict scenario, you will be. Now is the time to prepare your strategic approach to the defense of these cases.

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LITIGATION SKILLS

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A PARADIGM SHIFT IN PREPARATION

By Shane O'Dell and Charli Morris

The Ten Best Questions Your Opponent Will Not Ask Your Witness, and Why You Should

Introduction: Where NOT to Start with a Witness

It may surprise you that we would lead with where NOT to start, but so many experienced litigators follow a routine with witnesses that is largely driven by time and budget constraints, and which sometimes favors efficiency over efficacy.

The Old Way: Dos and Don'ts (But Mostly Don't)

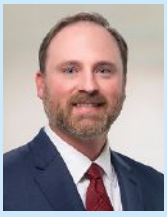
Every practicing attorney has a tool kit: Dos & Don'ts, Rules & Regs, Tips & Tricks. Countless practice articles and YouTube™ videos provide the most typical advice given to witnesses preparing to testify for deposition or trial:

- Stay calm, just relax, and be yourself (only better).
- Listen. To. Every. Word. In. The. Question. Pause between the question and your answer. Then answer only the question that is asked.
- Don't argue. (Unless you need to; then argue, but do it very, very carefully.)
- It's okay to say you don't know or can't recall.
- Don't volunteer information. Keep your answers short.
- Answer in your own words.
- Sit up straight. Wear a clean shirt. Think about where you are looking.
- Keep your hands away from your face. Keep your finger out of your nose.[1]

And, yet, we find in practice that a lot of the rules we give our witnesses also have meaningful exceptions. And every bit of advice we give is harder for a witness to do than it sounds.

[1] True story. This one is now on Charli's checklist list for good reason, but it wasn't always.

Shane O'Dell is the managing member of the Fort Worth, Texas, office of Naman Howell Smith & Lee PLLC. Shane strives to effectively and efficiently advise his clients to make sound business decisions from the initial investigation throughout the judicial process while driving great results and value. When not spending time with his amazing wife and three wonderful children, Shane is a big Baylor and Texas Tech sports fan and enjoys playing golf (not very well). Shane is the Publications Chair for the DRI Trucking Committee and is a member of the FDCC and IADC. **Charli Morris** has been assisting lawyers since 1993 in civil litigation and criminal cases. Her expertise is in the design and analysis of jury research, case theme development, opening statement/closing argument construction, jury selection strategies and voir dire questions, and witness preparation. She was among the first to obtain a Master's Degree from the University of Kansas designed specifically for litigation consulting. She is a die-hard fan of the Jayhawks, and she has used her persuasive communication skills to indoctrinate her three kids (and the dog) to Rock Chalk for life.



An Exception for (Almost) Every Rule

Here are a just a few examples from the short list of the most common tips reflected above:

- Very few witnesses should relax during a deposition. And which "self" are we looking for, exactly: the corporate rep on an all-expense paid industry trip to Las Vegas, or the truck driver stuck in traffic on the interstate approaching his limit on Hours of Service? For people with no experience giving a deposition at all, they have no idea how to imagine being "themselves" in a room full of lawyers where every word and every "um" is typed into a transcript while they are under oath.
- Surely, we do want the witness to be their "best" self, but a better bit of advice is to be human in the deposition. What we really mean is: if you have something to concede, concede it; if you feel empathy for someone who was injured, show it; if remembering the details of the accident is upsetting, you're allowed to take a break to regain your composure; if you lose your way during the deposition, you're allowed to recover and even change your answer if needed.
- Witnesses may not have an answer to the question as worded. Maybe it's a loaded, multi-part question. Maybe it's a statement – disguised as a question – using rising vocal inflection at the end of a sentence? Maybe it's not a fair question. Maybe the wording of the question is confusing, so the witness cannot answer and should ask for clarification instead.
- *Responding* is a more accurate way for a witness to think about what comes after a lawyer's question, and that often leaves room for interpretation and requires a clear choice about how to respond. Which means a good witness is a thinking witness, not just a hearing and answering one.
- Saying you don't know too often can cause jurors to wonder if the witness was ever qualified for the job they are testifying about. A witness will need more than a few ways to say, "I don't know," or "I don't remember," and sometimes a witness also needs to establish *why* they don't know/remember something for the sake of maintaining their credibility. Mister Always-Certain-Sometimes-Right is the worst company any of us could ever have at the dinner table or on the job, and Miss I-Don't-Have-A-Clue is equally disappointing.
- If a witness never volunteers useful information during a deposition, the jury may perceive them as hostile, defensive, withholding, uncooperative, or lacking confidence: all of which can and will kill their credibility. Choosing when, and how, to volunteer some information is absolutely something an effective witness can and should do to carry our themes, create a complete record, and put the best construction on the evidence.

With so many rules – and so many legitimate but subtle, nuanced exceptions to the rules – even an experienced witness can struggle to deliver truthful, effective, and persuasive testimony while they try to remember the Dos and Don'ts. And the least experienced witness will wilt under the pressure, eager to please their attorney but overwhelmed. Not to mention that very few of these rules say anything at all about the actual facts of the case (which could be actually terrible for a witness), and never mind that nothing about giving testimony under oath is like any other type of communicating humans naturally do.

Where Could We Begin Instead?

We argue for a shift away from classic "woodshedding" techniques to a collaborative, curious process that capitalizes on the witness's own experience, perspective, and personality to allow their inherent credibility to come through in sworn testimony. And we recommend this shift for a number of compelling reasons, including:

- According to statistics cited by the Civil Jury Project at NYU, 99 percent of civil cases do not proceed to trial.[2] What happens during discovery will impact decision-making on both sides of every case and at every turn. Plaintiffs' counsel, plaintiffs, defense counsel, clients, insurers, mediators, and judges will evaluate cases depending on how credible (or incredible) the witnesses and their testimony may be, and we all learn that first-hand at the time of depositions. The impact our witnesses make on the disposition of a case cannot be underestimated.
- Plaintiffs today – compared to twenty years ago – file their Complaints with a fully-developed narrative in it, and this is the first pleading in any case. Using confirmation bias to their advantage, plaintiff's counsel gets the first opportunity to tell the judge a story and everything they seek in discovery is designed to align with that. Most attorneys are still genuinely curious about the individual witnesses they depose, but they also come with a game plan that flows directly from the narrative they have already carefully constructed. And that often includes stereotypes about truck drivers, safety directors, human resource managers, and corporate execs.
- A witness never gets a second chance to make a first impression. "Thin-slice stimulus" research has demonstrated that decision-makers (jurors) draw lasting conclusions about witness credibility in as little as five, ten, or even thirty minutes of video testimony. To think that we can save our story for trial (which may never come) is a mistake, particularly in the age of videotaped depositions. Besides, it has always been true that turning a "deposition lemon" into "trial lemonade" compromises a crucial element of credibility: consistency.

This approach is also a psychological shift from an overall negative tone for preparation (e.g., do this, not that; say less, not more, etc.) to a positive, encouraging, and reinforcing one. In order to effectively prepare witnesses for the high-stakes, unfamiliar, unsettling experience of testifying under oath, we need to lower their anxiety, cultivate their trust, assuage their fears, and invite their personal buy-in from the start.

Top Ten Questions to Prepare Your Witness (for the Rest of their Preparation)

The following ten questions were developed as a method for preparing witnesses by consultants (including Morris) at the Zag-

[2] See **https://civiljuryproject.law.nyu.edu/**

noli McEvoy Foley Ltd. trial consulting firm in Chicago. Several decades ago, when the approach was first developed, attorney-clients were still consistently coaching witnesses to say "yes," "no," or "I don't know," at their depositions and instructing them to save their story for trial. Trial consultants knew and understood from social science research on everything from learning styles, verbal and non-verbal communication behaviors, components of credibility, and the psychology of persuasion, that every witness would be different and require preparation that was tailored to their strengths, weaknesses, and abilities.

All these years later, lawyers and trial consultants who have prepped hundreds of people who perform the same jobs nationwide still agree that no two witnesses will be exactly alike. We recommend asking each witness the following ten questions that are designed to draw them into active engagement in their own preparation, rather than passively receiving the rules.

1. How would you describe your previous experience as a witness? What advice were you given? How well did you think you did?

For many fact witnesses this will be their first civil deposition, but you can prompt with examples of other "witnessing" experiences to empower them in a small but important way right off the bat. If they have ever given a statement as an eyewitness to someone else's car wreck, or spoken at a family/custody hearing, or been interviewed about an on-the-job incident, you can get them thinking about what it means to be a witness, and invite them to find some comfort in having at least a little experience under their belt. And that will open up the opportunity for you to educate them on the particular experience of testifying in a civil lawsuit.

The least experienced witnesses don't know what they don't know, and the most conscientious witness who wants to do well can be extremely nervous. Some witnesses – out of an abundance of caution – will argue unnecessarily with the deposing lawyer, refuse to concede even the simplest harmless fact, and end up creating more tension for themselves than necessary. A less experienced witness might assume they can "hurry the deposition along" by educating plaintiff's counsel on how things work, or trying to convince the other side that it doesn't have a great case against the company. Both types of mistakes by the beginner are almost always well-intentioned, but also almost always disastrous for a deposition.

This is also a critically important question for even the most experienced witnesses who may have gotten no advice, bad advice, or developed bad habits through repeated opportunities. Even experienced corporate representatives may get "too comfortable," and think they can outsmart the plaintiff's lawyer. They (wrongly) anticipate where the questions are going and attempt to head them off at the pass, instead of controlling the pace and waiting for their best moments. Over-confidence fails witnesses almost every time, and even those with experience have not always been given direct and specific feedback that helps them know exactly what they do well (and exactly what they do not).

When you ask a witness to measure their past experience testifying, ask them to rate it on a scale of one to ten with ten being perfect. It's easier for most people to assign a number first, and it invites them to consider and describe why that is the number they choose. If they don't know the reasons, you'll know they still have a lot to learn from the preparation with you.

2. What do you understand your role in this case to be? How would you describe your importance to the overall case? How do you compare to other witnesses?

In all of our experience these questions stump witnesses the most and suggest some of the best advice we can give a witness to help them find the context for their testimony. So often a witness truly has no idea who else might be a witness in the case or why. They almost never consider who the witnesses will be on the *other* side of the case and they often don't know the difference between fact, corporate, and expert witnesses. In fact, fact witnesses are typically siloed and silenced as soon as they understand they could be a witness, so it can be very hard for them to understand where they fit in.

A witness who comes to learn that they are not the ONLY witness who can talk about important issues in the case will instantly feel better just for having company. We like to reassure all witnesses that – as a team – we will not let another person speak for them, just as they may not speak for anyone else. We need witnesses to know why it is so important for all witnesses to avoid putting words in anyone else's mouth. "Stay in your lane" is the most apt and understandable metaphor for witnesses in any trucking case.

We've met witnesses who think (wrongly) that they are The Center of the Universe and witnesses who think (wrongly) that they have nothing of importance to offer. Both misunderstandings will make them dangerous in a deposition. There are times when we want to help strictly limit the scope of what they might offer and there are times when we need to expand it, but we are always reminding witnesses that they have skin in the game. They may not be the boss, or there may be no risk whatsoever that they will lose their job as a result of what happened, but every witness has their personal and professional credibility on the line when they are under oath. And the more they take that seriously, the slower they will go and the more careful they will be. If they think they have nothing to lose, give them something to consider.

No matter how much we want to protect them and keep them contained to their area of knowledge and expertise, we do need all witnesses to know where they fit into the bigger picture. While we will not necessarily share all information in the case with all witnesses during their prep, we do need them to have context so they know where their testimony ends and where someone else's begins. As we develop working case themes for discovery, having all witnesses on the same thematic page is crucial, even if what we teach them is to defer certain questions to other witnesses who may be better suited to answer.

When witnesses do this in a deposition, they are communicating to opposing counsel – and anyone else who sees or hears their

[3] See **http://www.thejuryexpert.com/2012/09/thin-slices-of-testimony/**

testimony – that they are careful, which is the one of the most important characteristics for any witness in every case. Jurors all want careful surgeons, careful accountants, careful construction workers, careful product engineers, careful drug companies, and careful truck drivers. Remind your witness that being careful in a deposition will convey powerfully that they are careful in their job too. And remember that being careful only makes sense to witnesses when they fully understand the context for their testimony and where they fit in.

3. What do you think are your strengths as a witness?
Four out of five witnesses will answer this question by naming a weakness first, as they search their minds for what might be a strength. The best thing you can do when a witness is stumped on their strengths is to name one or two for them, based on the conversations you've had so far, even if this is the first meeting. Be specific to be persuasive and encourage confidence in the witness: "So far, what I know for sure is that you have a really great way of speaking plain language about your technical work and that's going to be a huge advantage to you in a deposition. I'll be sure to highlight the strengths I see throughout our prep sessions so there is no doubt in your mind about what is working for you."

4. What are your weaknesses as a witness?
The least confident, most nervous witness will have no shortage of ideas on this question. But once they have listed a few, be careful to reassure them that every weakness typically exists on one side of a two-sided coin. The witness who admits she is "too emotional" can be encouraged to recognize that she may be incredibly empathetic, which is endearing to most jurors and the opposite of arrogance. The witness who admits he "talks too much" can be reminded that quick thinking and high energy could help him stay alert throughout the deposition, and our practice will teach him how to contain and channel it.

For the witnesses who cannot name any weakness, it can go one of at least two ways. For the arrogant witness it could be very important early on to remind them that a weakness also always lives on the other side of the strength coin: "You have a lot of confidence in how you do your job, but that could make you say more than you should, and play right into the plaintiff's strategy to discredit you," or "You are clear and intent on setting the Plaintiff straight, but that makes it likely that you'll come off as argumentative or defiant, and it will diminish the more important aspects of your credibility."

These questions about strengths and weakness will help you identify whether the witness is possessed of self-awareness, or suffers from a total lack thereof. It also creates the opportunity for you to say that the feedback they receive in preparation will be specific and direct to amplify what works and minimize or eliminate what does not. If you promise candor from the start, and then deliver both positive and constructive feedback to a witness throughout, you are building trust and confidence in the witness.

5. What are your fears about testifying?
Following a thoughtful conversation about their expectations, this question is where we often get something a witness has not yet had the courage to say, even if they've met with you once or more before. Be aware that the majority of witnesses are intimidated by lawyers and they perceive a lot of their own lawyer's questions as cross-examination.
Sometimes a witness waits for the lawyer to leave the room and whispers to a consultant:

- "Will they find out about my arrest when I was a teenager, or my bankruptcy and foreclosure?"
- "My ex-spouse accused me of things I didn't do when we went through a nasty divorce, can the lawyers on the other side have those records since we went to court?"
- "Could I lose my job if I don't do well in this deposition?"
- "If I'm named in this lawsuit, I'm afraid they will take my house."

When you invite witnesses to admit and express their fears so you can offer reassurance in real time, you are fostering trust in your witness, which makes them more open to your feedback and suggestions. Witnesses who know they can trust you to protect them during the process will also work harder to improve how they communicate, and invest themselves more deeply in the preparation process.

For most witnesses, the self-reflection and self-assessment you provoke with the first five questions will require a short break in the prep session. Here, you can announce to them that the next five questions will take them to the facts of the case, where many of them feel at least slightly more comfortable.

6. What do you most want the jury to know about the case? What do you most want to explain or teach to the jury?
This might require the attorney to give a broad overview of what the Plaintiff is claiming in the lawsuit, but keep it short. For the witness who has no idea, you may want provide some prompts: What do you do in your job? What, if anything, do you know firsthand about what happened? If someone thinks you did your job poorly or the company isn't a safe company, what would you wish they knew instead?

Often, witnesses have ready answers to these questions and you can almost always detect whether they are good teachers or on the defensive. Consider the difference between, "I want the jury to know how much our company trains us on safe practices and how much continuing education we get on the job," versus, "I want the jury to know the Plaintiff is being greedy and she is as much at fault for causing the accident as anything I might have done."

This isn't necessarily the time to educate the witness on what you hope they will teach or explain, but it can be a good opportunity to suggest a few positive things that you know they have to offer. Remind them that they will have to practice listening to questions and responding appropriately to find the right opportunities to teach and explain.

Be aware that whatever a witness thinks they MUST explain or teach is important to them and you will have to be very direct in

the practice Q&A to help them decide if, when, and how to deliver the testimony they may be chomping at the bit to give. By the same token, the witness who thinks they have nothing to share must be encouraged to find opportunities to convey at least enough to establish the elements of their own personal/professional credibility.

7. What do you want the jury to know about you? What impression do you want to make?
It is sometimes surprising that this question draws a blank for a lot of witnesses, especially those who are trying to avoid their role in the facts or who care too little about giving their testimony. Ideally, if you have to prompt them on the question, ask them about positive aspects you want them to demonstrate: Do you consider yourself a hard-worker? Do you feel good about the work you do? Are you proud of what the company accomplishes?

This may also be a good time to educate witnesses about the components of credibility and how easily it can be lost if a witness is deficient in even one of them. The chart on the following page is a full-page list we use to evaluate witnesses during a prep session (within a longer evaluation form that also includes specific verbal and non-verbal behaviors we also measure). We often show witnesses this list before we start making any notes about them during prep sessions, so they can fully appreciate what they will need to convey to be credible.

We explain that too often witnesses think the jury is only evaluating them in terms of how they do their jobs, which is defined by all the elements of Competence. But the reality is that even someone who has a lot of knowledge and experience can falter on other aspects of their overall credibility. Even the highest-paid accident reconstruction expert witnesses will falter if they are perceived by jurors as arrogant or inconsistent or biased in their work. While Competence is typically measured by a person's resume, Likability and Trustworthiness are the components of credibility we have to convey through our communication behaviors.

Components of Credibility

Trustworthiness

Dependable	Reliable	Consistent	Honesty
Objectivity	Fairness	Helpful	Listening Skills

Competence

Expertise	Knowledge	Credentials	Reputation
Achievement	Professionalism	Intelligence	Training
Experience	Skill	Authority	Vocabulary
Control	Confidence	Memory	Teaching Skills
Precision			

Likability

Warmth	Manners	Friendliness	Openness
Assertiveness	Boldness	Energy	Attentiveness
Human Interest	Temper	Argumentative	Defensive
Confidence	Listening Skills	Empathy	Humor

The interactive process of asking witnesses to think about what they want to get across in a deposition (#6 and #7) is an excellent way to educate them without giving long lectures about how to prepare for their testimony. We routinely show and tell witnesses how we score them during each prep session on these elements of credibility as a way of giving them direct, positive, and constructive feedback they can use to improve.

8. What do you have to say that could help the case?
Again, the witness could surprise you by having no clue what they would say to help the case, or by suggesting a variety of things you've never considered. Their answers also tell you how much thought they are giving to being a witness when you are not around.

Sometimes witnesses have facts that no one has discovered yet – both good and bad – and they may not know what is actually "helpful" to the case.

- "I keep this document in my files with all the records going back ten years because our company is regularly recognized by the industry for our outstanding safety record." (helps)

or

- "I back-up my work cell phone to my personal cell phone so I never lose anything, and I still have all the texts and pictures from that whole year when the accident happened." (hurts)

We recommend gathering all the ideas a witness might have in response to this question, and NOT jumping in quickly to counsel them on what does not help. You'll need some time to consider what they have, what should be done with it, and how you will help them give truthful testimony in response to the questions they are asked. When you hear them say something that truly is helpful to their own credibility or to the case overall, be sure to give positive reinforcement for it on the spot.

The most important thing is to encourage candor so you can see what they have to offer. The same will be true for the next question too.

9. What do you have to say that could hurt the case?
For many witnesses, this is the only thing they have focused on so far or they think it is the only thing the lawyers care and worry about. A credible witness will be honest on this question and their answers often reveal what they fear the most. Sometimes they are right but sometimes they are wrong, and they need your reassurance that the preparation is designed to help them make honest concessions because it is key to their own credibility and the credibility of our case.

The witness who cannot think of anything on this question is pretty vulnerable, and may not know where the deposition traps will be set. For this witness we offer reassurance that we believe we know what the worst facts in the case are, and we are there to help them understand how to handle those issues one question at a time in their deposition.

Far and away the most important thing we can do is to remind witnesses that they must tell the truth – even about things that could hurt the case – because Liars Lose Lawsuits. There is absolutely nothing good that can come from the witness lying or even fudging the truth, and effective communication techniques (that we can teach them) will help them work their way through even the worst of what they may have to discuss.

10. What kind of help do you want or need from your attorney to prepare (so that you can feel confident and comfortable giving a deposition)? What questions do you still have that we can address before your next prep or the deposition?
This is a great question to ask witnesses at the beginning and the end of every preparation session. Sometimes what the witness tells you is comical ("What is your best advice if I get pulled over for a speeding ticket?") and it can break the ice or ease their anxiety. Other times they have no idea what lawyers can do to help them because they've only seen lawyers on TV, so you can use your own self-effacing humor to lighten the moment, "Have you heard the one about the three lawyers who walked into a bar…?"

Be sure, if a witness asks for something that you cannot give them, to tell them ***why*** so they don't feel bad for asking or suspect you are hiding something from them. "We're not showing you all the Plaintiff's medical records in this case because: a) they are private, and b) you're not a medical expert witness who can testify about the contents. If you're asked whether you know anything about the Plaintiff's medical condition your honest testimony will be very easy to give because all you really know is that you hope they are doing as well as possible."

It can also be very reassuring to a witness when you tell them the greatest help you offer is to take things they may have worried about off their plate, so they don't spend any time on things they are not responsible for.

Witnesses don't always know what they can or should ask but there have been times when we hear them ask for information that seems completely obvious to us but remains a mystery to them: "I have no idea what you are talking about when you say the word interrogatories…," or "I don't usually wear a suit to work so I guess I have to find one that fits before the deposition?" or "Can I plead the fifth in my deposition, like I've seen on TV?"

Importantly, remind them that when a question comes up, they can reach out to you confidentially at any time, so they don't worry or stew unnecessarily.

Planning Your Prep Sessions

This approach to witness preparation includes some practical considerations, such as:

A. We plan for multiple sessions with each witness – each one shorter than a full day (4-6 hours at a stretch with a lawyer talking about a lawsuit is plenty for most witnesses) – over a period of time (days, weeks, or months) prior to their testimony. Where needed, this also gives us a chance to meet with more than one witness in a full day, which allows us to learn and compare what each witness will contribute to the overall testimony in our case.

B. We devote the first full hour of the first prep session (sometimes longer) to "un-packing the witness" using the ten questions, so we can get to know them better before deciding which communication strategies will work best. This also gives us a much better opportunity to develop – *with and through the witness* – the context and a framework for their testimony, before we offer specific advice during the practice Q&A.

C. We save the rules and tips for the actual practice Q&A when – during increasingly longer, uninterrupted segments of 10, 20, or 30 minutes – we can show them how the rules apply and where there may also be exceptions. Most witnesses cannot comprehend the rules or imagine how the rules work until they have begun to practice under our watchful eye in "rehearsal" mode. We don't jump in with coaching on every question and then resume asking; we allow a witness to make mistakes, to get as many "do-overs" as they need, to try new things, and to learn by doing.

D. While the attorney is responsible for facts, exhibits, law, and an endless supply of practice questions, the consultant is taking detailed notes and scoring the witness on all aspects of witness communication throughout the session (even when not in practice mode): verbal/non-verbal behaviors, demeanor, and the components of credibility. We intentionally catch the witness doing it right as often as we can, and we offer constructive and specific feedback as needed, along with suggestions for alternative choices that will serve the witness better.

Conclusion

Shifting your focus to collaborative, perspective-building prep sessions – as opposed to a more traditional lecture about "The Rules" and a litany of things NOT to do in a deposition – will help highlight a witness's natural credibility. Instead of attempting to build a deposition robot, you can teach the witness to lean on their experience, personality, and knowledge to enhance their credibility. Setting expectations, addressing their fears, and attending to their weaknesses will create buy-in, builds rapport, and prepares a witness to be confident, comfortable, and in control of their testimony.

If you'd like more information or would like to discuss witness prep in more depth, please contact either Charli Morris at charli@trial-prep.com or Shane O'Dell at sodell@namanhowell.com.