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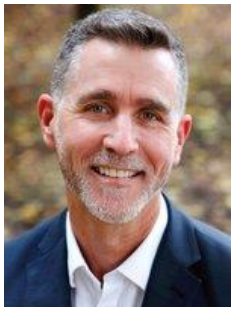
Teaching Witnesses To Avoid Cross-Examination Traps

By **Jeff Dougherty** (November 7, 2019, 4:31 PM EST)



Jeff Dougherty

If you are a trial attorney, what's one of the worst things that can happen to your case? It's when your witnesses get trapped by their own words; admit to things they don't believe and aren't true; agree with opposing counsel's version of what the facts mean; and contradict their own testimony.

When these things happen, witnesses lose credibility; their anxiety increases; their confidence decreases; they feel foolish; and they become frustrated, which leads to fight-or-flight.

Whether in the deposition or at trial, this is always bad and must (and can) be prevented. So what can trial attorneys do to prevent these witness catastrophes? It starts with understanding why witnesses get trapped by their own words.

Since most of the trouble occurs either in the deposition or during cross-examination, the discussion will focus on witness testimony derived from questioning by opposing counsel.

Why Witnesses Get Trapped

Because most witnesses have never testified, they approach communication in the litigation setting the same way they approach communication in the professional and social settings. The problem with this strategy is that professional and social communication settings aren't typically adversarial, they aren't under oath, and they aren't rife with rhetorical traps.

How Witnesses Get Trapped

One of the key reasons using normal communication strategies in litigation sets witnesses up for failure, is the casual way most people handle questions that have an implied absolute in them. For example, in the real world, if I were to ask someone if basketball players are tall, a reasonable answer would be yes. But is yes the right answer? No. Why? Because there have been at least 24 basketball players in the NBA under six feet tall. In the real world, these few exceptions are inconsequential, but in litigation they're not. So in litigation, the same question under cross-examination might produce the following exchange:

Q: Are you familiar with the sport of basketball?

A: Yes.

Q: Are basketball players tall?

A: Yes.

Q: Is a 5-foot 3-inch man tall?

A: No.

Q: Are you familiar with Muggsy Bogues, a 5-foot 3-inch man who played for the NBA?

A: Yes, but ...

Q: You just testified that basketball players are tall, so are you saying Muggsy Bogues wasn't a basketball player?

A: No.

Q: Then were you lying when you said that a 5-foot 3-inch man isn't tall?

A: No.

Q: Then were you lying when you testified that basketball players are tall?

A: No, but ...

Q: OK, I'm confused, then is it your testimony that a 5-foot 3-inch man is tall?

A: No, but ...

Q: It was a yes or no question. Is a 5-foot 3-inch man tall?

A: Um ... I ... I don't know, I mean no.

Q: Let me ask you this: Are you familiar with the following men who range from 5-feet 5-inches to 5-feet 9-inches in height: Earl Boykins, Spud Webb, Nate Robinson or Calvin Murphy?

A: No.

Q: Would you consider any of them to be tall men?

A: Um ... I don't know. I mean, I guess not ...

Q: So based on what you just said, none of these men could have been basketball players correct?

A: Correct.

Q: Would it surprise you to learn that all of these men played professional basketball in the NBA?

A: I don't know. I guess not.

Q: But didn't you testify earlier under oath that basketball players are tall?

A: Yes.

Q: Let me remind you again, you are under oath, so according to your testimony, none of these men could be basketball players right?

A: Um... I... uh... yes.

Q: Well then is it your testimony that none of these men played in the NBA?

A: No.

Q: But you just told me under oath a few minutes ago that basketball players are tall, didn't you?

A: Yes.

Q: So you really don't know anything about basketball or height do you?

A: Um … I …Yes, I do.

Q: We will let the jury be the judge of that.

It gets ugly fast. The witness in this example was boxed in with nowhere to go. Unfortunately, question and answer sequences like this happen all the time in depositions and at trial. The basketball example is mundane, but what if a similar question and answer sequence happened in a lawsuit in which someone has been seriously injured or killed, and a corporate representative gets similarly trapped in his deposition or in front of the jury?

And what if the topic concerns safety training, personal protective equipment, safety devices or warning labels? Catastrophic for a defendant, great for a plaintiff.

Witnesses can avoid getting trapped in a box like in the basketball example, but it requires learning a new way of thinking.

How Attorneys Should Teach Their Witnesses to Think About Questions From Opposing Counsel

There's only one way to avoid "the basketball trap" scenario: Witnesses need to learn how to think about every question before they provide any answer. A vital step to this process is learning how to pause before answering questions. But pausing for the sake of pausing isn't enough. Witnesses need to pause with a purpose.

To accomplish this, witnesses need to learn how to break down each question/answer scenario into three distinct phases: listen, consider and deliver. This sounds simple but it's not easy, because nobody does this in everyday communication settings. Therefore, attorneys need to teach this process to their witnesses in detail.

Phase One — Listen

During this phase, the witness must be patient and attentive. Patience means no matter how long, short, simple or complex the question, the witness waits until the questioner stops talking. Attentive means not anticipating future questions, not worrying about previous answers and it also means looking for any problem with the question, i.e., false assumptions, mischaracterizations and absolute-type questions.

Unless witnesses wait until the absolute end of the question they often miss crucial problems with the question and then they agree with things that aren't true, they accept premises that are incorrect, they make objecting difficult, they get themselves trapped by their own words (and so on).

Phase Two — Consider

During this phase, and before answering, the witness must ask him or herself the following questions:

1. Do I understand the question? If the answer is no, the witness must ask for the question to be repeated.

2. Am I the person that knows the answer to the question? If the answer is no, the witness must not attempt to answer the question — never guess, hypothesize or speculate.

3. Does the question ask about a fact? Or, does the question require analysis, judgement or context? Is counsel interpreting a set of facts and asking for agreement?

- If the question is factual in nature, the witness can safely answer with an absolute answer (yes/no, true/not true, correct/incorrect, etc.).

- If the question requires analysis, judgement or context, or lays out a set of facts and asks for agreement then an absolute answer is likely the wrong answer and can lead to a basketball-type dilemma.

The reason most witnesses get themselves trapped, is they haven't been taught about part 3(b), thus when opposing counsel asks the analysis/judgement/context questions in absolute terms — "Wouldn't you agree with me that ..." or "Isn't it fair to say that ..." — witnesses answer in absolute terms because they don't know what else to do. Once this happens, witnesses get trapped because they don't realize that in litigation, yes means yes 100% of the time and in every circumstance.

Now opposing counsel has the witness admitting under oath that when they see X they must always do Y, otherwise it's negligence. Next, the witness is shown that in this case, X was not done in response to Y. Now the death blow. Opposing counsel asks: "Since John saw X and didn't do Y, you would agree that John was negligent right?" The witness has no choice but to say yes.

An exercise that helps witnesses think about each question correctly and parse the fact questions from the analysis/judgement/context questions is to literally ask themselves (silently): "Are there any exceptions — even remote — to what opposing counsel is proposing?" If there's just one exception, the witness must not provide an absolute-type answer.

Let's look at some examples on the basketball scenario:

Simple variation:

Q: Are there tall basketball players?

A: Yes.

This is a safe answer because it affirms an unchangeable fact — there are tall basketball players.

Q: Are basketball players tall?

A: Yes.

This is the wrong answer because there are exceptions, but no is also the wrong answer. So what's the right answer?

There are various right answers to the question all of which are true and all of which keep the witness from being boxed in. Examples include:

- It depends.
- Not necessarily.
- Most are.
- Generally speaking.
- Not all of them.

In practice it gets a little more complicated because opposing counsel uses rhetorical devices to increase the likelihood that the witness won't distinguish the form of the question. For example, opposing counsel might ask many fact questions in a row (at a quick pace), to which the only answer is yes. The witness is now on yes autopilot.

Next, opposing counsel goes in for the kill and slips in a question that feels the same as the previous questions and seems to follow logically from the previous answers, but actually requires analysis, judgment and context.

Complex variation:

Q: You're familiar with the game of basketball, aren't you?

A: Yes.

Q: You're aware that the rim is 10 feet from the ground, right?

A: Yes.

Q: You would agree that being tall can be an advantage when playing basketball, right?

A: Yes.

Q: You would agree with me that most basketball players are taller than average, right?

A: Yes.

Q: You would agree that coaches and owners of NBA teams want the best players in the world, right?

A: Yes.

Q. You would agree with me that most players considered to be the best in the world are taller than the average man, right?

A: Yes.

Q: You would agree with me then that the best practice when drafting players for the NBA is to always choose tall players?

A: _____

Since there are exceptions to the last question — you wouldn't pick a bad tall player over a good short player like Spudd Webb — the right answer cannot be yes or no. It has to be some variation of the following:

- Not always.
- It depends.
- Generally speaking.
- Not necessarily.

Phase Three — Deliver

During this phase, the witness delivers the shortest truthful answer that address the question and nothing else. Here, witnesses need to be taught not to justify, defend or explain their answers. This will feel unnatural to most witnesses, so they'll need to be reminded that unless asked by opposing counsel, the explanations come under direct-examination.

If they try to provide unsolicited explanations under adverse questioning, bad things happen — e.g., they will look argumentative, give opposing counsel more ammunition, get cut off by opposing counsel or worse be reprimanded by the judge to answer the question, all of which damages credibility.

Conclusion

The prescription outlined above might seem obvious if you are an attorney, but if you're a witness it's not. Witnesses aren't used to scrutinizing questions in the way they must and they aren't comfortable leaving answers at "not always" or "it depends." They will feel like they're being evasive.

However, with hard work, rigorous practice and the right kind of feedback, it will click. Witnesses will

learn that these types of answers both prevent them from getting trapped by their own words, and (more importantly) are actually the truth. Once this realization occurs, witnesses don't simply survive, but they thrive in the face of adverse questioning.

Jeff Dougherty is the president of Litigation IQ.