

## 10 COMMANDMENTS FOR WITNESS PREPARATION

By: John Buckley



These are the 10 rules for effective witness preparation. I have been using the Ten Commandments format for 15 years now, so apologies to those offended by the borrowing of the religious phrase. For those who wish to read religion into them, be forewarned: You cannot display them in stone in a courthouse lobby. But they are useful, so read on.

**1. TELL THE TRUTH.** This is the most important commandment. Make sure your witnesses understand. If they lie, they will get caught. If they get caught on something small it ruins their credibility. Not just on the small thing, but their entire testimony. The adversary system is designed to catch cheaters. It usually does.

**"The process of being a good witness is more listening than testifying."**

**2. Listen Carefully To The Question Posed.** The process of being a good witness is more listening than testifying. If you haven't heard the question, you cannot give the best answer.

**3. Wait For Any Objections.** A few seconds pause will give your witnesses time to carefully consider the question and give you time to phrase a proper objection. An answer that comes before the objection lets the cat out of the bag before you have a chance to stop it.

**4. Listen Carefully To Any Objections.** The lawyer's objection is the window to the lawyer's thought process about the question. While many jurisdictions, and the federal rules, prohibit speaking objections, a careful listener can still pick up the lawyer's concerns by listening to the objection. Objection, compound (the lawyer is asking two questions). Objection, assumes facts not in evidence (the lawyer is putting a presumption in the question that has not been established). Objection, miss-states the witnesses prior testimony (self explanatory). Be careful with the last one, however. Unless the questioning lawyer has made a prefatory statement summarizing the witness's testimony, the objection is improper. For example, a question: Isn't it true that you testified to a, b and c?... is not improper. It is, in fact, a question seeking to confirm. And the mischaracterization objection in that context is a coaching of the witness to answer in the negative. The point is that the witness should listen actively to everything that is being said, not just the questions.

**"It is the questioning lawyer's right to ask whatever questions he or she wishes. It is the witness's duty to answer, truthfully and completely, the questions posed. The duty ends there."**

**5. Seek Clarifications If Needed.** Once the question is asked and the objections are handled, it is time to consider an answer. It is important to understand the question, however, before any answer is given. Tell your witnesses if they don't understand the question, they should seek clarification before answering. Trying to clarify after-the-fact is often found to be too late.

**6. When Ready, Answer The Question And Only The Question Asked.** It is the questioning lawyer's right to ask whatever questions he or she wishes. It is the witness's duty to answer, truthfully and completely, the questions posed. The duty ends there. So tell your witnesses to answer what they have been asked, not what they think is relevant or what they think should have been asked or what they think the opposing counsel needs to make an assessment.

For example, I represented a manufacturer in a product liability suit involving hospital equipment. My witness was a maintenance technician for the manufacturer who had been ordered to install a new machine and remove the old one. He did so, and in the process "decommissioned" (scavenged) the old machine for parts to assist him in maintenance of other machines. A week later after the installation and decommission, plaintiff's lawyer sent a letter demanding preservation of the machine. Of course, a spoliation suit followed.

At deposition, the technician remembered the commandment to answer the question and only the question posed. It was a simple question. Have you ever been deposed before? His answer, no. The questioning lawyer, being a civil lawyer, must have imagined that anyone who had never been deposed had never testified at trial so he didn't ask the next question. You can imagine his surprise in the defense opening statement, after he blistered this witness and accused him of subverting the law by destroying evidence, when we explained to the jury that the technician was a former police officer injured in the line of duty and permanently disabled. His foot was crushed attempting to help victims in an accident. He became a technician with our client because the injury left him unable

to perform his duties as a police officer. You can also imagine the jury's reaction to plaintiff's accusations in light of the fact that this technician had dedicated his life, and sacrificed his health, upholding the law. The case settled for less than the cost of trial immediately after plaintiff's counsel recovered from the shock of hearing this, for the first time, in the defense opening statement.

Answer the question and only the question posed. What the other side doesn't find out can hurt them.

**7. Don't Volunteer.** The corollary to commandment number 6. Questions are about the exchange of information and the more information your witness needlessly provides the other side, the more questions they will develop and the better prepared they will be.

**8. Yes, No, I Don't Know And I Don't Remember Are Responsive Answers.** If these short answers are complete and truthful answers to the questions posed, tell your witnesses to give them and wait for the next question.

**9. Don't Guess Or Speculate.** This is an area where most witnesses get into trouble.

We take information in three ways: (1) orally (listening); (2) visually (seeing); and (3) kinesthetically (feeling). When we receive information in one of those ways we retain about 30%. If we receive it in two of those ways (hearing and seeing, as in the use of exhibits and graphs along with testimony) we retain approximately 65%. If we receive the information in all three ways, we retain about 90%. That means there are always gaps. We try to fill those gaps in with logic. The problem rests in the fact that life is not always logical.

Tell your gap-filling witnesses that if life was illogical that day, the miss-statement impairs the credibility of all of the witness's testimony, not just the testimony on that single point. Resist the urge, don't try to fill in the gaps.

**10. Answer From First Hand Knowledge Unless Asked Otherwise.** The matter of listening carefully to the question posed. If you are asked what happened at the accident at State and Main, and you were not at State and Main and did not hear or see the accident, the proper answer is that you do not know. The fact that your neighbor Billy Bob told you that he saw the plaintiff's car run the red light at State and Main that day, it is not something you know for a fact and not something you are required to provide in response to the question of what happened. If, however, you were asked whether you heard anything about that, then Billy Bob's statement is a responsive answer and must be divulged.

**"Answer the question and only the question posed. What the other side doesn't find out can hurt them."**

These are the 10 commandments. And remember, they are different from the stone tablets. There are exceptions to these rules. And while you will not go up in flames for refusing to obey them, they will certainly help you keep your witnesses from going up in flames on the stand. ⚖️

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