WITNESS TESTIMONY

This material is designed to prepare you for your upcoming trial or hearing, at which you will provide important testimony. Theoretically, testifying should be easy and natural. But, as any witness will tell you, the experience of testifying is anything but easy and far from natural. This information should prepare you for the process of testifying and make you a credible witness for your cause.

Many people believe that a trial is a "search for the truth", and no doubt it should be. For better or for worse, however, a trial frequently comes down to a competition between two methods of communication. I stress to clients that a trial is fundamentally a contest between two different "communication systems". Everything we do at a trial should promote our "story" or communication system. You promote your story in everything you do--your appearance, your demeanor, and most importantly your testimony.

Being a witness is the most important function you will serve in your upcoming trial. It is your one and only chance to communicate directly to the Judge regarding this case. All other communications have been and will be through pleadings or through the oral argument of counsel. Your time of direct personal communication to the court is unique and important. Therefore, some care and preparation should be put into this aspect of your trial preparation.

These materials are designed to provide you with some basic information regarding testifying and to teach you to be the most effective witness possible.

Truthfulness Above All

The first and absolutely most important aspect of testifying is truthfulness. Above everything else, your first obligation is to tell the truth. It may be tempting to fudge, but that is *not* acceptable. It is not acceptable to me, it should not be acceptable to you, and it certainly is not acceptable to the court. *The truth, for better or for worse, is always your primary duty*. When a witness takes an oath it imposes a serious and solemn obligation to be truthful. If a witness speaks falsely under oath, it could expose the witness to perjury or other serious charges. It most certainly would cause that witness to have no credibility with the Judge, and would most likely result in a bad outcome at trial. More important than all this, telling the truth is always the right and honorable thing to do and thus the only thing to do. In brief, the truth is the "Alpha and Omega" of testifying. When we work on your testimony as attorney and client, it is permissible for me to familiarize you with the questions I will ask, and to give you appropriate guidance and verbal skills, but it is inappropriate to change or direct the substance of your testimony in any way. Nothing that I ever say or do should be construed to counsel fabrication or anything other than the legitimate good faith truth.

My standing instruction to all my witnesses is tell the truth always. Always tell the truth.

Our state supreme court in **State v. Montgomery, 163 Wn. 2d. 577 (2010)** held that lawyers not only have the right to prepare their witnesses to testify, but also *the duty* to do so. At a minimum the lawyer should explain the process and acquaint the witness with the rules of the courtroom. The lawyer should also prepare the witness for the questions he will be asked so that time is not wasted and evidence can be presented to the tribunal in a clear and comprehensible way. Therefore, there is nothing inappropriate or manipulative about preparing a witness to testify.

You begin being a "witness" the moment you walk into the courtroom, and you remain a "witness" throughout all of your interaction with the court during the case, both direct and indirect.

Although truthfulness is the overriding imperative in being a witness, there are other rules and tips that apply as well.

1. Apparel

You should wear apparel which is respectful. Don't overdress or under-dress. If you have never worn a suit in your life, don't start on the first day of court. Dress as though you were going out for a nice dinner, to church, a job interview, or some similar function. T-shirts and ratty jeans should be avoided. I will never forget my first ever trial. It was in juvenile court and my client, a youth with a lengthy record, was charged with residential burglary and assault. He wore a t-shirt that said, "I like my beer cold and my women hot!" I may as well have bought him one that said "guilty."

2. Taking The Oath

When you take the oath, you will come forward, and the Judge will swear you in. It seems like a perfunctory act, but don't let it be just that. The judge is administering the oath. Make it a meaningful personal exchange between the two of you. You should look the Judge in the eye, and affirm "I do your honor" in a clear, audible voice. It is the first direct impression you give to the court. It's okay to nod or smile, but be natural.

3. Eye Contact

After truthfulness, the most important attribute of a good witness is eye contact and body language in general. *Look at the Judge*. You don't want to convince your attorney, the opposing counsel, or anyone else of anything. You need to convince the

Judge, and the Judge alone. Make regular eye contact with the Judge. Position your chair so that you can see the Judge regularly. Don't stare, but make regular periodic visual "check-ins" with the Judge. Take your cues from the Judge. If the Judge is looking at you and appears to be particularly interested in a portion of your testimony, then respond accordingly by looking at him or her. Eye contact is crucial. Your appearance, body language, and general demeanor are what determine your credibility as a witness in conjunction with the internal consistency of your testimony and its external corroboration.

Unfortunately, these days judges have the luxury of reading the witness' testimony in "real time" on their computer monitor as recorded by the court stenographer. Many times they focus on their computer to the exclusion of the human being providing the testimony. If your judge is in love with his computer then you may need to check in less frequently, but don't forget about him even if it looks like he has forgotten about you. If he suddenly turns his gaze on you from his computer screen be ready to visually engage him.

4. Direct Examination

There are two types of testimony--direct examination and cross examination. You should be familiar with the differences between them. Direct examination is questioning by the side who called the party as a witness. Cross examination is questioning by the opposing side.

As indicated, a trial is often viewed as a search for the truth, but this axiom is a bit romanticized. Perhaps a trial should be that proverbial quest for the truth, but it is not. Trials are really just brief snapshots of complicated events and periods of time in people's lives. The Judge does not search for the truth. In fact, the Judge does not search for anything. The Judge is a passive and mostly silent auditor who simply listens to information presented to him. Therefore, that package of information that we present to the judge must say it all and must say it well.

More than a search for the truth, *a trial is a contest between competing systems of communication*: The system your side presents, and the system the other side presents. Everything presented in a trial should be calculated to advance our communication system and challenge the opposing party's communication system.

This is not meant to be cynical or manipulative. Our duty is always to impart the truth to the court, but care should also be taken to ensure that our communication to the court is effective, persuasive, and clear, even entertaining, if possible. This makes things easier for the Judge. The system of communication we present to the court is multi-faceted. Our system of communication consists of opening argument, direct examination, cross examination, the exhibits we present, the written material we

submit, and finally, closing argument. Naturally, the system of communication seen as more persuasive, plausible, and reasonable, is likely to be accepted by the court as more likely true.

In direct examination, only open-ended questions can be asked. Leading questions are not permitted. The examiner cannot lead you through your testimony. This makes it a challenge and requires some considerable preparation so the witness knows what is being asked and understands what is expected of him. On direct examination, the lawyer asks questions designed to serve up brief, bite-sized chunks of information to the Judge. For example, consider the following:

Why do you want custody of your children?

That is an open-ended, proper question for direct examination. An improper leading question in direct examination would be to rephrase the question as follows:

Isn't it true that you want custody because your wife has had three nervous breakdowns, is a cocaine addict, and is dating an axe murder?

That is a leading question because it feeds the answer to the witness. Leading a witness is proper for cross examination, but not for direct. Not only is such a question improper, but it's also *ineffective*. Why? Because the *questioner* is the proponent of the information rather than the witness. Simply put, the attorney is testifying, not the witness. That is an ineffective and unpersuasive method of imparting information, and it deprives the testimony of all of the human drama and significance associated with it. Rather than the attorney spoon-feeding a witness various propositions which the witness affirms, it is *the witness* who should be delivering a narrative that is engaging and dramatic. On direct examination, we want *the witness* to testify, not the attorney. It is the witness's time in the sun, so to speak. It is the witness's time to be in the spotlight. An effectively told story from the witness's own words and perspective is much more persuasive than spoon-fed, pre-packaged information from the attorney (on cross examination, it is a different story, as we will see).

Now, reconsider the first question above: ***Why do you want custody of your children?*** It's a relevant, properly phrased question, but it suffers from being pretty open-ended. There is a vast expanse of information and history behind such a question. A loquacious witness--or a witness who is unprepared--could unleash a barrage of testimony that provides every conceivable reason why he wants custody, replete with anecdotes and examples over the last ten years. Such a response might provide both good and bad evidence from the advocate's point of view. Overall, it may be even be a good, convincing narrative, but we must remember that it is the "*system of communication*" that matters. The information needs to be packaged and presented in a cogent and comprehensible way. A Judge can be overwhelmed by an unregulated

tsunami of information from the witness. The Judge has no ability to *anticipate* important forthcoming information because it all comes at him without any cues or warnings in an unregulated wave. Similarly, the Judge does not have an opportunity to *savor* important bits of information because no sooner has the information registered with the Judge, than the witness is off and rattling on about something else, perhaps equally important. Much important data will be lost in an unmanageable avalanche of information.

A much better method is to "set up" the information flow. This allows the judge to anticipate what is coming and ponder the significance of it. Lawyers always follow the old rhetorical device of *1) tell him that you are going to tell him; 2) tell him; and 3) tell him what you've told him.* This familiar paradigm allows for information to be *anticipated, savored*, and then *fully digested*. It makes for a more persuasive system of communication. Let me illustrate:

Why do you want custody of your children?

ANSWER: ***Well, there are three general reasons that have prompted me to seek custody. First, the mother has a history of mental health problems, including several suicide attempts and involuntary hospitalizations. Second, she is addicted to cocaine. And finally, her new boyfriend is a convicted murderer.***

The table has now been set for the Judge. He knows that there are three basic areas of concern. They have been introduced, and now the court can anticipate the factual development of these specific themes. Contrast this with the aforementioned flood of information that flow from a witness in an unmitigated stream. One method is persuasive and effective, and the other is just plain frustrating.

After the table has been "set", subsequent questions can elicit the specific nature of the mother's mental health issues--the symptoms, the diagnosis, hospitalizations, suicide attempts, etc. Once that entire area of mental health has been fully developed by way of "bite sized" portions of information, the questions will move on to drug use and then to the boyfriend in similar fashion. You can see what we have done here. We have told the judge what we are going to tell him. Then we told him, and at the very end we would sum up with a question or two by telling the judge what we have told him. This allows for a clear, comprehensive and persuasive presentation of evidence.

5. Themes

Any case and any communication system should have an overriding theme. Perhaps the theme of the case is *"Greedy developer exploits community*," or "*Selfless father gives all for children,* " or *"Taking his separate property robs him of his birth-right."*

Every good case should have a good theme. Admittedly, this might be a bit ambitious when it comes to the mundane task of dividing property in a divorce, but distilling any human conflict or drama down to a lively theme is helpful and enhances the "communication system." In developing a theme, it is important to have certain buzz words, slogans, or sound bites. Certain catch-phrases can be useful in furthering the theme of a case. The client should adopt them, and they should appear regularly throughout the presentation of the case--in argument, in pleadings, in cross and direct examination. "*If the Glove Don't Fit, you must Acquit"* is one of the most memorable slogans in recent legal history. That is something catchy that any juror can relate to. The theme of the Simpson defense was police conspiracy or official incompetence, but the glove made for a great sound bite which advanced the theme.

Trials or hearings in front of a judge are much different than trying a case before a jury, but a judge is still a finder of fact, albeit a sophisticated one less apt to swoon over lawyers' clever word play. Still, an appropriate and thoughtful theme advanced by effective soundbites can even be persuasive to a judge.

Ordinarily, we associate these types of devices with cynical attempts to manipulate, but they are important shorthand methods of conveying information. Slogans, axioms, or clichés take root in the first place because culturally they express some fundamental truth. In any litigation, the development of a memorable theme supported by catchy aphorisms or maxims will create a more effective communication system.

Occasionally I use sports analogies when describing direct examination to clients. The questions that I ask my witnesses on direct examination are like soft balls lobbed to a batter. If you prefer football, then the attorney is the quarterback who simply hands the ball off to the star witness who runs for valuable yardage. It is a progressive, incremental experience. You don't have to secure a touchdown the first time you touch the ball. You move the ball downfield in a series of plays. Similarly, you build your case and create your story question by question.

Direct testimony should be vivid, action-oriented, and full of effective word pictures, examples, and anecdotes. As we develop your testimony, be thinking of the kind of examples or anecdotes which are available to employ. These are the kinds of features that make for an effective speech or a well told story. The same is true in testimony. A witness who claims that his wife suffers from mental illness is providing information to the court. A witness who relates a story about how his deranged wife would hide herself in the closet and the whole family would have to scour the house looking for her also conveys information to the judge, but does so in a much more vivid and memorable way.

Simple moments like teaching your child how to bait a hook or ride a bike can be turned into poignant vignettes in testimony about child custody or parenting issues. Be thinking of these "word pictures" in advance and they can be weaved into the tapestry

of our trial narrative. It is all part of a persuasive communication system.

In nearly every case where I have a witness testify, we will do a couple of mock examination sessions so you can practice your testimony, and polish our little gems of truth. We learn each time we practice as more effective anecdotes and situations come to mind. These types of practice sessions prepare you for the questions I will ask and give you an opportunity to shape and sculpt your answers in an effective way while always showing scrupulous fidelity to the truth. Occasionally, a witness is actually asked in cross examination whether they "rehearsed" their testimony before court. Like any other question that must be answered truthfully, but you can also add that you were emphatically instructed to "tell the truth."

6. Cross Examination

Cross examination is when you are questioned--grilled would be a more appropriate word--by the opposing counsel. Unlike direct examination which is a series of soft balls by your own attorney, cross examination is hard ball. Unlike direct examination where open ended questions are the norm, cross examination involves a series of short, very pointed leading questions. Not only are leading questions permitted in cross examination, they are also the most effective technique that a questioner can employ for controlling a witness and ensuring the careful flow of information to the court.

Hailed as the most effective device for the ascertainment of truth ever developed, cross examination is a constitutional right enshrined in our Bill of Rights. As you will see, cross examination shouldn't be questioning; it should be a beating.

Cross examination is a series of propositions vigorously impressed on the witness disguised as questions which challenge his credibility or advance the case of the other party.

You were convicted of assault in 1999?

ANSWER: *Yes.*

You assaulted your wife?

ANSWER: *Yes.*

She was injured?

ANSWER: Yes.

She had to get medical attention?

ANSWER: Yes.

Medical attention included several stitches to her forehead?

ANSWER: Yes.

This assault which injured your wife took place in front of your children?

ANSWER: Yes.

The children you now seek custody of?

In cross examination, the witness doesn't really testify so much as merely affirm the accusations of the cross examiner. Ideally, the attorney knows the facts, and better yet, the witness knows that the attorney knows the facts, and so the witness will simply affirm each of the propositions that the attorney propounds. This is effective cross examination.

Once of the most important objectives of cross examination is to impeach the witness. Impeaching a witness is nothing more than giving the judge a reason to doubt or question the witness's credibility. Prior statements of a witness are the most fertile source of impeachment.

You testified that your wife is an inadequate mother?

ANSWER: yes.

You say that you should have custody of the children?

ANSWER: yes.

Do you remember when you told your wife you wanted a divorce?

ANSWER: yes.

Do you remember writing her a letter?

ANSWER: Not really.

Maybe this will refresh your memory. Handing you what's been marked as Petitioner's Exhibit Number 1, do you recognize this?

ANSWER: Kind of.

I'm sorry, just answer my simple question. Do you recognize this document or not? (at this point, what could the witness possibly say but yes?)

ANSWER: Um. Yes. I recognize it.

Is this a letter?

ANSWER: I guess.

Don't guess. Is it a letter or isn't it?

ANSWER: Yes, it's a letter.

That's in your handwriting?

ANSWER: yes.

You wrote this letter?

ANSWER: yes.

You signed it?

ANSWER: Yeah, but it was written a long time ago.

If you want to say that 7 months was a "long time ago". Please take a moment to read this letter you wrote such a long time ago...In that letter written such a long time ago, do you say to your wife "you have been the perfect mother"?

ANSWER: Yeah, but I was just trying to be nice.

Please just answer my simple questions yes or no. Do you say "our kids have been so blessed to have you raise them"?

ANSWER: uh huh.

Do you further say "I envy your relationship with our children"?

ANSWER: Um, yeah.

And finally, do you close the letter by saying "thank you for being such a

wonderful mother and rest assured I would never do anything to take the children away from you"?

ANSWER: Yes.

And of course you were referring to the children you are now trying to take from her?

ANSWER: Yeah.

No further questions.

That is impeachment. Not uncommonly, people act and talk in ways that are fundamentally inconsistent with their testimony at trial. Be careful to review all of your written statements and deposition transcripts. Be aware of any inconsistencies or discrepancies between what you say at trial and what you have said previously.

The best advice for answering questions on cross examination is to <u>be brief</u>. Answer the question yes or no. It might be painful, but it is a lot less painful than being dissected like a writhing specimen when you try to equivocate, qualify, or obfuscate. Notice in the foregoing example every time the witness tried to be even a little evasive or cute, it just came back to hurt him even more.

Consequently, just answer the question yes or no and the damage will have to be controlled later on. Evasiveness, game playing, quibbling about words, and other tributes to your ego will only make matters worse. Be brief, be pleasant, be truthful, and hope the experience of cross examination passes with minimal pain and suffering.

Never try to score points on cross examination. It is difficult and risky. You're not that smart and the rules are stacked against you. Containment or damage control is all you should worry about. Don't try to be clever, cute, or sarcastic. Be respectful and decent and truthful. The rules on cross favor the questioner, and he is in control. Just hunker down, answer the questions, and get out of the hot seat.

Don't be afraid to concede valid points. It if is valid, acknowledge the point and let the process move on. Quibbling will only make the process last longer and perhaps highlight the issue more than it would otherwise be.

Isn't it true you wrote your wife a letter at the time of separation?

ANSWER: I don't remember.

Well, does this exhibit number one refresh your memory?

ANSWER: Not really.

Well, is that your signature at the bottom of the letter?

ANSWER: I guess so.

Don't guess, is that your signature or isn't it?

ANSWER: Yeah.

The witness looks evasive and petty, prone to argue self-evident facts. He should just acknowledge the obvious from the beginning and not play games. The witness just kept giving the questioner more material to make him look deceptive. After those first few questions, the judge was introduced to two critical facts - number one, here is an oily witness; and number two, that must be a blockbuster of a letter written to his wife. The witness highlighted his own weaknesses and also inadvertently "hyped" the letter.

If he had just acknowledged the letter from the beginning, he would have done better. On cross examination I tell clients, "be honest, be brief, and be done".

7. The Five Elements Of Credibility

Taken broadly, there are five basic elements of credibility. Although it is intuitive, it is not always recognized or understood that persuasion, and indeed the effectiveness of all communication is best gauged as a receiver-based phenomenon. In other words, it is not the message sent but the message received that is critical. Research has consistently shown the following factors to be key elements of credibility:

- Confidence/Expertise - Will the audience perceive your witness as knowledgeable, informed, having a full grasp of events described in testimony?

- Trustworthiness/Honesty - Will the audience perceive your witness as a purveyor and seeker of truth? Does your witness have the audience's goal of understanding foremost in his or her mind?

- Sociability/likeability - Will the audience perceive your witness as friendly, helpful, and enjoyable?

- Similarity - Will the audience perceive your witness as objectively or subjectively like themselves?

- Dynamism/Composure - Will the audience perceive your witness as engaging but controlled?

Additional "credibility cues", according to research and confirmed by experience and intuition, include brief pauses (presumably to suggest thoughtfulness), pitch and tempo variety, conversational style, and humility (a haughty manner is something no witness can survive, and this is a subject on which judges are more sensitive than juries).

By contrast, experts also identify "dishonesty cues" to include the following:

- Nervous gestures and mannerisms;
- Excessive shyness;
- Unresponsiveness (what are they hiding?);
- Poor memory or recall;
- Uncooperative;
- Argumentative;
- Overly talkative;
- Too literal or technical (Most famously, Bill Clinton's "It depends on what the meaning of the word is 'is'?")

We have all had experiences with people when we begin to question the truthfulness of what they are reporting, and usually it is as a result of some "dishonesty cue." Admittedly, it might be unfair to adjudge someone deceptive merely because they were too shy or a bit more nervous than we think they should be. However, credibility is in the mind of the receiver and a good "communication system" must always be concerned with how it is being received and interpreted. If a judge will evaluate your credibility as a result of "dishonesty cues" then it is a fact worth remembering and accounting for to the extent possible.

In the end, the goal of good witness preparation is not to manipulate a judge or a jury, but to allow a witness to effectively tell their story and to be themselves in the process. The witness must know what their theme is and what their narrative will be. It has to be presented in an organized, coherent, and clear way.

Truthfulness and credibility must reign throughout the witness's presentation. Witnesses who are nervous, overly shy, overbearing, nonresponsive, subject to a poor memory, or otherwise uncooperative or argumentative do not present an effective communication system. A person who is concerned with the truth, too talkative, and who appears likable and presents the truth in a clear and coherent way is optimizing the opportunity to persuade the finder of fact.

This material won't make you a perfect witness. Sometimes, I kiddingly tell people that if I could be both lawyer and client I would win every case. I'm not sure how literally true that is, but it underscores the universally acknowledged truism that clients, more than they ever realize, often speak and act in ways that are adverse to their interests.

If they are unprepared, clients can do much damage to their cause on the witness stand. Hopefully, with some fundamental knowledge and a little preparation, you will only help and never harm your cause while testifying.

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