

# Prepping Your Reporter, Editor, or Broadcaster

## Telling the Story: Part 1

SUSAN BUCKLEY

No one would dispute that a libel trial can often turn on the credibility and persuasiveness of the testimony of the journalist whose work is the target of the plaintiff's ire. I would offer eight do's and don'ts that media law practitioners might consider in preparing reporters (or editors/producers/correspondents) for their time on the stand.

### Master the record.

There is no excuse for your witness to be surprised on cross by any document or video that is relevant to the case.

And no matter how often your witness promises to spend his own time mastering the documents, there is no substitute for spending a significant amount of time reviewing both the helpful and more problematic documents together in the course of meeting with your witness in advance of trial and designing your direct examination. That is not to say that there are no useful homework assignments. Get a commitment from the witness to review his deposition transcript, including all exhibits, as often as he can stomach it (and then some), and test him during your prep sessions on his command of that testimony.

### Spot and cut the bull.

As diverse as they may be from one part of the country to the other, juries all have an uncanny ability for spotting arrogance, pretentiousness, overt advocacy, and simple disingenuousness. In considering even the very first moments of your journalist's testimony (typically the introduction of background facts), create a plan to deliver her résumé in a story-like, interesting fashion that fairly focuses on relevant experiences without a lot of chest puffing. You're introducing a person, hopefully a person the jury will come to like. If reviewing past projects is

productive for the case, focus the journalist on the importance of the stories themselves rather than her importance in reporting them. Keep your ears attuned for phoniness and get rid of it.

### Avoid rigid scripts.

It is simply counterproductive to have a rigid script for the direct examination of the witness. It squeezes all vibrancy, spontaneity, and life from the witness's testimony. A jury can spot an over-rehearsed script a mile away and will simply turn their ears off once they do. In preparing the witness for direct testimony, never do it the same way twice. Skip around. Change the words. Keep a bit of an edge.

### Get the advocate out of the witness box.

Why do witnesses often think they should respond with an "Absolutely not!" when a simple "No" will do? Because they're confused as to their role. A most important part of the witness preparation process is pointing out to your witness when he is sliding into the role of advocate instead of sticking to his role as a witness.

### Tell a story.

The least effective direct examinations of a principal witness are those that adopt the checklist approach, simply hitting on the key facts and issues and eliciting answers helpful to your case. Work with your witness to weave the key facts into an interesting and cohesive story. The jury will be more attentive, and the witness will be more credible.

### Find a stunt double to cross.

If you have a good sense of who will likely be conducting the cross-examination of your witness, enlist a lawyer (preferably on your trial team) to conduct mock cross-examinations in a similar style. Do this at least twice, more if your witness handles cross-examination poorly. Should you videotape this exercise? I don't find this

particularly helpful unless your witness is a train wreck and doesn't know it.

### Raise the comfort level.

Consider and plan for every possible thing you can do to make the witness most comfortable in the courtroom. Bring the witness to the courtroom before his testimony and give him a tour. Explain how he will get in and out; where he will stand to be sworn in; what he will be asked to say; where the judge, jury, and court reporters will be. Discuss how he should sit, how to adjust the microphone, how he will be shown exhibits, and where he should put them when questioning about them is complete. Don't overlook minor details such as where he will find his water and when he should ask for more.

### Work with the witness on how best to communicate.

The last thing you want to have happen is for your witness to take the stand and turn into someone you've never met before, *e.g.*, a condescending jerk, an unabashed salesman for his cause, or a Milquetoast mumbling at his shoe. Nerves are a funny thing. Mock trial

**Editor's Note:** This is the fifth in a series of practice pointers from experienced trial lawyers on each phase of the trial—from jury selection to closing arguments. In this issue, we've called on three lawyers to discuss how they prepare reporters, editors, and broadcasters for trial. Previous practice tips have covered voir dire (Spring 2007-25:1); jury selection (Fall 2007-25:3); opening statements (November 2008-26:1); and cross-examination (July 2009-26:3). PDFs are available on the Forum's website ([www.abanet.org/forums/communication/publications.html](http://www.abanet.org/forums/communication/publications.html)).

exercises can help on this score, assuming that the results are not discoverable in your jurisdiction. Visualization techniques are helpful, too. Encourage the problematic witness to address the jury as, say, a panel of his professional peers, or a group of his eighteen-year-old daughter's best friends or a bunch of college classmates at an important seminar—whatever works best for him to help him present as a sincere, intelligent person addressing intelligent people.

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*Susan Buckley (sbuckley@cahill.com) is a partner in the New York City office of Cahill Gordon & Reindel LLP.*

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## Telling the Story: Part 2

AMY GINENSKY

Having your reporter take the stand can evoke the same feeling you get as you walk away from your child's room after dropping him off on his first day of college: although you may be able to helicopter in occasionally to offer help and guidance, you know that both the reporter and the freshman are pretty much on their own at that point. Hopefully, you have given them the tools to use their own attributes to face whatever is thrown at them. Because each case is different, each cross-examiner is different, and each reporter has his own personality, a strategy that works with one may not be useful for another (just like with children). And although lessons learned from one case can apply to others, in the end, like your child, all reporters have their own DNA; and there is only so much you can do to help them prepare. You will no doubt have to hold your breath until they are safely home again.

There are, however, three areas in which you can help your reporter in the courtroom: jury perception, storytelling, and familiarity with the article/broadcast.

### **The jurors need to think the reporter is like them (or what they want others to think they are like).**

Let's face it: journalists' reputations are even worse than those of lawyers. As a result, your jury is likely to peg your reporter, before meeting him, as an arrogant, biased hotshot. The jury,

despite even the best voir dire, may well assume that the reporter, in every line written and in every broadcast, is trying to sell newspapers or increase ratings and is not going to worry very much about the truth in doing so. And have no doubt that the plaintiff's counsel, in opening, will reinforce that portrait of your client.

You're unlikely to be able to change the image of the industry in one trial, so what you need to focus on (through the reporter's testimony, the testimony of others, and your reinforcement in closing) is disassociating the client from the stereotype. The juror needs to come to see the reporter not as "the reporter" but as "Joe" or "Jane," someone who is just like the juror (or what the juror wants others to think the juror is like): someone who every day gets up, goes to work, has many tasks to do, takes the job seriously, and takes pride in it. Someone who, even if there is a mistake, or a sentence that could have been written better, certainly didn't appreciate that at the time; otherwise, he would have done it differently, because Joe or Jane, like the juror, always tries to do the best job possible. Although there may be exceptions, generally getting the juror to empathize with the reporter, i.e., to put himself in the reporter's shoes, and to make the juror feel as if he can really feel what it is like to walk in those shoes will go a long way toward fighting the stereotype and the assumption that your client was not trying to do the right thing.

Of course, this is much easier said than done, but it can be done because, in truth, the average reporter is not much different than the average worker/juror. Many reporters, when you meet them, seem like average people with a down-to-earth aura. Explaining to those reporters how important it is that jurors see them as they are (just average workers, albeit working in an unpopular field) is sometimes sufficient to get them to reflect the demeanor that you want the jury to see.

Others, however, need more than mild coaching. Each witness is, of course, an individual, and there is no formulaic treatment for those who appear arrogant and just don't seem to "get it." I have used a number of approaches, including telling a witness who liked to boast that she got the difficult assignments because she was the

best and the brightest that she may want to consider that jurors tend to like to hear others heap praise on the reporter rather than hear the reporter praise herself. With a different witness, who had a public persona of arrogance, my suggestions were blunter. Frank discussion, role playing, videotaping, whatever it takes, you have to get that reporter to the point where jurors can identify enough with him as a person to prevent them from assuming that the reporter stereotype applies.

### **The reporter must tell the story.**

Once you have established the reporter as someone a jury should listen to with an open mind, you must give the reporter the opportunity to tell the story. Unleash the witness.

From my experience in libel cases, the first witness often called by the plaintiff is the reporter. The plaintiff's counsel, using leading questions and giving the witness little opportunity to explain, does his best to paint the reporter as someone who has acted in an unreasonable and deceitful way. Given vigorous preparation, the reporter can swat away much of the attack. However, he is unlikely to have had the opportunity to tell the story. That's your job.

In my last trial, the plaintiff's counsel kept the reporter, his first witness, on cross for a number of hours. Questions followed by short answers (because the judge did not give the witness the opportunity to explain) created a lot of tension in the room. When the opportunity came for us to question, rather than start with background, I asked the witness a simple question: Why did you write the story as you wrote it? Like a breath of fresh air, given the proceedings thus far, the witness launched into a soliloquy, explaining in detail why he did what he did. Of course, he had been prepared for the question, but in what appeared to be a nonrehearsed answer, he detailed for the jury the picture of why he had written the story as he had, answering some of the questions asked by the plaintiff's counsel in more than the one-word answers previously permitted. In a show-not-tell way, he made his actions appear quite reasonable. We then went over the remaining issues raised on cross and finished up with some background about the paper, news reporting, and the reporter. In the end, during the plaintiff's case, the jury had

a favorable picture of our guy. According to the jury interviews afterward, the combination of the initial open-ended question and the reporter's reasoned telling of his account gave the jurors the sense that they finally were hearing what happened and that the plaintiff's counsel had been trying to have them only hear what he wanted them to hear.

Now, you may not be so lucky in getting this prime placement in the case to tell the story, but if you have a reasonably articulate witness, try to give him the opportunity to recount the story early so that the jury can see, from the reporter's mouth and not yours, why he did what he did.

### **The witness needs to know the article/broadcast.**

From the time you first meet with the reporter until the time he gets on the stand, you need to work with him to ensure that he has complete comfort with the words of the article or broadcast. (This goes beyond knowing the themes of the case.) The reporter needs to be able to articulate what was meant by each word used, why it was used, and why that language made sense under the circumstances. It sounds easy and second nature, but achieving that level of complete confidence, which doesn't waver either during deposition or under cross-examination at trial, is critical. The reporter needs to be able to answer every question the plaintiff's lawyer will ask about the words chosen (or not chosen). Although repeated drilling can result in stilted testimony, on this critical issue there can be no surprises. The reporter needs to know, before testifying, what his answers are going to be. Any doubts need to be faced, answered, and resolved. This preparation is sufficient only when the reporter is fully comfortable, has dealt with the demons that may be lurking, and has fully internalized the answers. Although nailing this aspect of the testimony will not necessarily win the case, failing to score a ten here might well lose it.

In the end, as with the child you left at the freshman dorm, if you help witnesses be comfortable with themselves and with what was published and have

given them the platform to shine, they will be better able to meet the challenges that they will, without question, face.

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*Amy Ginensky (ginensky@pepperlaw.com) is a partner in the Philadelphia office of Pepper Hamilton LLP.*

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## Telling the Story: Part 3

ROBERT P. LATHAM

Your reporter (or editor) is likely to be one of two dominant figures in the trial (the other one is the plaintiff). The reporter needs to keep that in mind at all times. Although you should make every effort to make the reporter's testimony and the trial about the journalism, in the end at least some component of the jury's analysis will be about the reporter himself.

### **Remind the reporter that he is (always) being observed.**

Even when the reporter is not on the witness stand, it is pretty much assumed that the jury is periodically, if not constantly, observing both you and your client's demeanor at the counsel table. Jurors will look to see how the reporter reacts to key pieces of testimony, especially from the plaintiff or perhaps from another witness affiliated with the publisher who might be telling a contradictory story. When we spoke to the jurors after a lengthy libel trial, they mentioned how important those conflicting stories were and how they looked to see the reporter's reaction. Your reporter should not give any reaction that the jury is likely to perceive negatively. He should sit focused and attentive and avoid facial expressions. It is worth reminding your reporter of this instruction periodically throughout the trial.

### **Prepare the reporter to engage in Storytelling 101.**

One of the goals in any trial is to make the jury understand how a story comes together. The reporter should be prepared to walk the jury through the process. He should explain but not lecture.

He should let the jury know why the story was important—why the journalism was important—and get away from making it about reporter versus plaintiff.

It is okay for the reporter to be passionate about journalism, but not self-aggrandizing. Furthermore, the reporter shouldn't let his passion for the craft spill over into perceived venom toward the plaintiff.

### **Prepare the reporter to explain how it happened.**

The reporter should inform the jury about who is on his team, letting the jury know that he doesn't have the unbridled ability to say whatever he feels like saying in a story and that there is a review process that is handled sincerely and soberly.

If the story contains a mistake, the reporter should not run from it and should not point fingers. He should take ownership of it and explain that an honest mistake was made. The jurors may be able to excuse an honest mistake if they believe it is unlikely to happen again. If they don't see the reporter taking ownership of the mistake, they may feel that they need to send a message to prevent it from happening again.

### **Give honest feedback.**

A mock trial with videotaped deliberations of the jurors can be an invaluable means to educate the reporter about how he is likely to be perceived. An effective jury consultant staging the mock trial will be able to get mock jurors to discuss what they didn't like about the reporter, what they didn't like about what the reporter did, and what else they wanted to hear from the reporter.

### **Be aware of the courthouse beat.**

For reporters who have covered trials, you may have special challenges. Find out any misleading or erroneous assumptions they have made from covering trials, and then purge those ideas from their systems. 

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*Robert P. Latham (blatham@jw.com) is a partner in the Dallas office of Jackson Walker L.L.P.*