Contents

About the Author xv
Acknowledgments xvii
Introduction xix
Note xx

Chapter 1
"Please Raise Your Right Hand . . ." 1

Chapter 2
Why Tell the Truth? 5
  1. Lying Is Wrong 5
  2. Lying Is a Crime 6
  3. Lying Is Hard 6
  4. Lying Is Confusing 7

Chapter 3
The Gaps 9

Chapter 4
The Perception Gap 11
  Defining the Perception Gap 11
  Understanding the Perception Gap 11
  Bridging the Perception Gap 12
Chapter 5
The Audience Gap
  Defining the Audience Gap 15
  Understanding the Audience Gap 15
  Bridging the Audience Gap 16

Chapter 6
The Conversation Gap
  Defining the Conversation Gap 19
  Understanding the Conversation Gap 19
  Bridging the Conversation Gap 20

Chapter 7
The Control Gap
  Defining the Control Gap 23
  Understanding the Control Gap 23
  Bridging the Control Gap 24

Chapter 8
Preparing Ourselves
  Goals 25
  Methods 26
  Tools 28
    Witness Notebook 28
    Witness Outline 28

Chapter 9
Understanding the Audience
  How to Help the Audience Understand Your Case 32
    Humanize the Witness 32
    Humanize the Party 33
    Simplify the Language 34
    Simplify the Message 34
Chapter 10
Three Mistakes Witnesses Make 35
1. “I’ll Just Tell My Story.” 35
   Consider the Questioner’s Advantages 35
      Experience 36
      Preparation 36
      Documents 36
      Other Witnesses 36
      Script 36
      Don’t Walk in Unprepared 36
2. “It’s Too Expensive.” 37
3. “I Didn’t Do Anything Wrong.” 38

Chapter 11
Seven Mistakes Lawyers Make 41
1. “I’m Too Busy.” 42
3. “All Witnesses Are Created Equal.” 43
4. “You Never Know What They’ll Ask.” 44
   Wear the Opponent’s Hat 44
   Use What’s Out There 44
   Use Their Stuff 45
   Use Other Lawyers 45
5. Preaching, Rather Than Teaching 45
7. “Do I Need to Draw You a Road Map?” 47

Chapter 12
What Preparation Means 49
Mistakes of Preparation 49
   Not Comprehensive Enough 49
   Not Tough Enough 50
Seven Steps for Preparing the Witness 50
   1. Start with an Introduction 50
   2. Review the Facts 51
3. Review the Process 52
4. Put It Together 53
5. Anticipate Problems 53
6. Do a Dry Run 54
7. Review Transcript 56
The When and Where of Preparation 56

Chapter 13
Basic Principles 59
   Principle 1: Listen, Listen, Listen 59
   Principle 2: Don’t Try Too Hard 61

Chapter 14
Rule 1: Take Your Time 65
   Multitasking 65
   Fairness 65

Chapter 15
Rule 2: Always Remember You Are Making a Record 71
   Keys to Testifying Successfully 71
      Take Your Time 72
      Be Conscious of Language 73
         1. Confusing Language 74
         2. Jargon Language 76
         3. Legalese 78
         4. Relative Language 79
         5. Loaded Language 80

Chapter 16
Rule 3: Tell the Truth 81
   1. The Truth 81
      “Oh, What the Heck!” 82
      Mistakes 82
   2. The Whole Truth 83
      The Bad Stuff 84
Be Yourself 85
The Good Stuff 86
3. Nothing but the Truth 87

Chapter 17
Rule 4: Be Relentlessly Polite 89
The Audience 89
The Challenge 90
Be Positive 90
Be Relentlessly Polite 90
Keep Your Cool 90
Don’t Tease the Bear 91
Leave It to the Lawyers 91
Don’t Play Games 91
Don’t Get Spooked by Details 92
Take the Questioner’s Frustration as a Compliment 93

Chapter 18
Rule 5: Don’t Answer a Question You Don’t Understand! 95
Three Tests for Questions 97
Clarity 97
Comprehension 97
Comfort 99
Common Types of Assumptions by Questioners 101
Category Assumptions 101
Concept Assumptions 102
Choice Assumptions 102
Wiggles and Squirms 103
1. The Court Reporter 103
2. The Follow-up Question 104
3. The Obstinate Child 105

Chapter 19
Rule 6: If You Don’t Remember, Say So 107
Important Points About Memory 108
Contents

What's Important for One Is Not Important for All 108
The Tougher the Issue, the Tougher It Is to Remember 108
Memory Fades Quickly 109
Faded Memory Becomes Random and Anecdotal 109
Anecdotal Memory Becomes Reconstructed Memory 110
“I Don’t Know” versus “I Don’t Recall” 111

Chapter 20
Rule 7: Don’t Guess 113
The Danger of Guessing 113
1. Guessing about Factual Details 113
2. Guessing about Inferences 115
The Curse of the Intelligent Witness 116
The Pressure of Inference Guilt 116
3. Guessing about Hypotheticals 117
The Attack Hypothetical 117
The Meteor Hypothetical 118

Chapter 21
Rule 8: Do Not Volunteer 119
The Witness as Artist 122
Revelations 123
Requests 123

Chapter 22
Rule 9: Be Careful with Documents and Prior Statements 125
Issues 125
Credibility 126
Language 128
Context 128
Protocol 128
Step 1: Ask to See It 129
Step 2: Read It 129
Step 3: Ask for the Question Again 130
Document Option Tree 132
Secrecy 160
“Target” 161
Testimony 161
The Power of Knowledge 162
Preparation 162

Chapter 28
The Trial Witness 163
Direct Examination versus Cross-Examination 164
  Direct Examination 164
  Cross-Examination 166
    Rule 1: Take Your Time 167
    Rule 2: Always Remember You Are Making a Record 167
    Rule 4: Be Relentlessly Polite 167
    Rule 5: Don’t Answer a Question You Don’t Understand 167
    Rule 7: Don’t Guess 167
    Rule 9: Be Careful with Documents and Prior Statements 168
    Rule 10: Use Your Counsel 168

Chapter 29
The Party Witness 169
  Helping Your Client Find the Right Balance 170
    Understanding 170
    Personality 170
    Emotions 170
    Core Themes 171

Chapter 30
The Expert Witness 173
  Three General Rules 173
    1. “Just Do It” 174
    2. Know the Territory 175
    3. The Lawyer Is the Captain of the Ship 176
  Checklist of Issues 177
  Testimony 179
Contents

Daubert 179
Anticipating Cross-Examination 180

Chapter 31
The Corporate Representative Witness 183
Issues Pertaining to a Corporate Representative Witness 183
Entity 184
Notice 184
Witness 185
Knowledge 185
Preparation 186

Chapter 32
The Physician as Witness 189
Key Challenges Doctors Face as Witnesses 190
1. Environment 190
The Doctor Is Not in Control 190
The Other Side Will Never Agree 191
The Job Is to Sell, Not to Solve 191
2. Expertise 192
Realize That Doctors Cannot Be Their Own Experts 192
Understand the Role of Literature 193
Know the Record 193
3. Ego 194
4. Emotions 194
Be Relentlessly Polite 194
Avoid the Blame Game 195
Develop Trust 195
Be Wary of Appearance 195
Keep It Simple 195
Remember—This Is Not a Conversation 196

Chapter 33
The Criminal Defendant 197
Reasons to Have a Criminal Defendant Testify 198
The Jury Wants to Hear It 199
The Defendant Wants to Say It 199

Chapter 34
The Ethics of Witness Preparation 201
What Can You Do? 203
The Perjury Dilemma 204
1. Persuasion 205
2. Narrative 205
3. Withdrawal 205
4. Disclosure 205
Lawyer Conduct during a Deposition 206

Chapter 35
The Witness Bill of Rights 209
1. You Have the Right to Control the Pace of Your Testimony 209
2. You Have the Right to Question the Questioner 210
3. You Have the Right to Tell Your Story 210
4. You Have the Right to Be Treated with Respect 210
5. You Have the Right to Clear and Fair Questions 210
6. You Have the Right to Forget 210
7. You Have the Right to Make Clear What You Don’t Know 211
8. You Have the Right to Silence 211
9. You Have the Right to See and Read All Documents 211
10. You Have the Right to Use Your Counsel 211

Chapter 36
Conclusion 213

Appendix A
Sample Witness Outline 217

Appendix B
Witness Preparation Summary Handout 219
Appendix C
How Are Things in Russia? 235

Appendix D
How Was Your Flight? 241

Appendix E
How Are Things at the Hospital? 247

Index 253