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Make the First Answer the Best Answer

In 2004, Kenneth Lay was indicted for securities and wire fraud for his role as CEO of Enron Corporation. At one time, Enron was a highly valued public company, but it ended in a bankruptcy brought on by an accounting fraud and corruption scandal for which Lay and others were blamed. Enron's fall was responsible for the loss of twenty thousand jobs, the loss of billions in shareholder value and retirement accounts, and the death of the preeminent accounting firm Arthur Andersen. With a disaster this monumental, the common wisdom suggested that someone had to have committed a crime along the way. Someone would have to pay for this.

Lay went on trial in 2006, leading to his conviction on nearly a dozen counts. While awaiting sentencing, Lay died, reportedly from a heart attack. But two months before he died, he testified in his own defense. The cross-examination was not pretty.

Q: Did you have one conversation with one person about getting your story straight for trial?

A: And again, could you elaborate on that, Mr. Hueston? I mean, what story are you talking about?

Q: Are you having trouble with that question? I'm just posing the same question.

A: Well, I'm not sure I . . . I'm telling stories up here. I'm up here to answer your questions.

Q: Have you contacted witnesses to get your story straight?

A: I . . . I . . . I don't know that I contacted witnesses.

Lay's cross-examination continued to go downhill. For example, he admitted that Enron employees did not have to be slaves to rules of conduct that Lay himself authored, that he sold his house in Aspen in two days (contradicting his attorney's contention that it would have been difficult for Lay to sell his Aspen house to raise money to cover a margin call), that Lay sold Enron stock back to the company for \$4 million to cover a margin call of less than half a million, and that he had other sources of capital to cover the margin call without having to sell his Enron stock back to the company. The government scored other points too: that Lay blamed everyone but himself for Enron's demise; that Lay's attribution of fault to short sellers of Enron stock did not apply to Lay's son, who sold Enron stock short; that Lay had a lavish lifestyle that included such things as chartering a boat for \$200,000 for his wife's birthday and going on a \$20,000 antiquing venture in Spain six days after selling \$4 million in Enron stock, and on and on. It was a brutal cross-examination.

Lay had said so many things on cross that his lawyer had an enormous job to do on redirect. Lay had to have hoped that his legal team was taking copious notes and putting an asterisk next to everything that needed fixing. But what a task redirect must have been. Think of all the challenges Lay's lawyer must have faced during the cross-examination itself, even before getting up to begin the redirect.

With each question from the prosecutor, any defense lawyer for Lay should have been thinking all of the following in the instant between the question and Lay's answer: How will he answer it? Will the answer hurt him? If it will hurt him, is the question objectionable? If I object, what's the likelihood it will be sustained? If it's overruled, will the jury think we were trying to hide bad facts? Will the answer be so bad that it's worth taking the risk of objecting and having the objection overruled? Am I going to need to object anyway to preserve appellate rights?

And with every answer Lay gave, the lawyer should have been thinking all of the following in the instant between the answer and the prosecutor's next question: Did that answer hurt us? Is this something I need to clean up on redirect? If so, I'll put an asterisk next to Lay's answer in my notes, and if I have time, I'll also make a note of what I should ask Lay on redirect. But will I know what questions to ask? Will Lay know what answers to give?

So much analysis, so little time in which to do it, and all while taking notes as quickly as possible in case the lawyer had to cover the point on redirect. Experience would have taught the lawyer that no witness gives flawless testimony on cross-examination. Some redirect would be required.

Listening to one's client being cross-examined is no cakewalk. It's hard work, multitasking in the extreme. It requires channeling all powers of concentration into each question and each answer. Each question and answer requires multiple levels of analysis, making a number of decisions and finally answering the following: Did the witness just say something I need to fix? Do I know enough to know what questions I can safely ask to fix it?

Think how much easier this multitasking would be if a witness could minimize the number of bad answers that need to be corrected on redirect. How much easier would redirect have been if, when asked whether he contacted witnesses to get his story straight for trial, Lay had answered "No, I didn't need to get my story straight with anyone" instead of answering with "What story are you talking about?" and "I . . . I . . . I don't know that I contacted witnesses"?

Really? Lay did not know whether he contacted witnesses? Was the jury now supposed to think that Lay did not contact witnesses to get his story straight? How was Lay's lawyer going to fix that answer on redirect? Wouldn't Lay's case have gone better for him if his lawyer could have scratched off that answer from his list of things to correct on redirect?

Good witness preparation is an ounce of prevention. Redirect is a pound of cure. Redirect is the time for the lawyer to make repairs, to rehabilitate the witness, to undo the damage opposing counsel did on cross. If a lawyer needs to conduct redirect, it means the witness has been injured. Wouldn't it be much better to prevent the injury in the first place and make redirect unnecessary?

For that to happen, the witness needs to give the best answer to the question the first time the question is asked. This should be the goal of good witness preparation.

Conventional witness preparation virtually ensures there will be redirect. It relies on redirect. It counsels the witness to say as little as possible, practically guaranteeing there will be more that the lawyer will want the fact finder to hear. And experience has shown that witnesses invariably answer at least some questions in a confusing or misleading way or simply answer them badly, although the legal profession has not yet woken up to how conventional witness preparation contributes to those bad answers.

Redirect heals only imperfectly. The problems extend far beyond the logistics of multitasking during opposing counsel's cross.

For starters, a long time can pass between the bad answer and when the lawyer gets up to start the redirect and try to repair the damage. During that time, the judge or jury has been processing the answers, making credibility

assessments, and trying to fit the answers into a narrative that makes sense. With two narratives usually on the table, a witness's bad answers will often more readily fit into the other side's narrative than into the witness's. The more time that passes between the bad answer and the redirect, the more likely it is that the stain will have begun to set and the harder it will be to bleach it away.

It is not simply the time lag that can make redirect harder. Redirect becomes more difficult with each bad answer that needs to be remedied. Logically, a cross-examination that produces only one bad answer will make for an easier redirect than one that produces many. Each bad answer creates a deeper hole from which the lawyer, on redirect, will need to remove the witness.

But even if judges and juries can keep an open mind until the witness is finally off the stand, and even if a thousand cuts on cross-examination created no more blood loss than a single cut, conducting an effective redirect is no easy task. At the outset, it requires setting the stage, calling both the witness's and the fact finder's attention to the bad answer and trying to reestablish the context in which it was given. If the fact finder had already forgotten the answer, then setting the stage will remind the fact finder of the previous bad answer and run the risk of reinforcing it. At a minimum, it will alert the fact finder that the answer hurt the witness.

If we assume that the fact finder remembered all the bad testimony and that setting the stage involves no added risk, the challenge then is how to do it. This involves more art than science, more technique than formula, and more judgment than textbooks might indicate. Setting the stage requires creating or recreating a context for the question, reorienting the jury to approach the story from a different perspective so that when the witness gives the remedial testimony, it makes sense and earns the jury's sympathy and trust.

The typical way lawyers try to set the stage is this: "Do you recall when opposing counsel asked you X and you said Y?" Sure, this calls attention to what is about to be clarified or explained away, but as a stage-setting technique, how effective is it? Does it paint a picture? Does it create any context for the remedial testimony to follow?

Or does it just sound like ticking something off a checklist? Does it trigger a subtext that reads something like this: "Here's a question that you flubbed on cross-examination. Let me ask you a question about it to see if I can get you to give a better answer." Is this setup going to help the next answer make sense? Is it going to earn the jury's sympathy and trust?

Unfortunately, many things work against an effective staging on redirect. Setting the stage or painting the picture takes time. But judges have a tendency to pressure lawyers to keep their redirects short so as to avoid imposing on the jury and to keep the trial moving. Other witnesses may be waiting in the wings, some of whom may have disrupted their schedules to come to court. To make sure they get on and off the stand that day, the judge will put even more pressure on the lawyer to speed up the redirect.

If the judge feels the lawyer is taking too long winding up before throwing the pitch, the judge might ask: "Counsel, didn't we go over this on direct?" If the jurors hear this, how are they to avoid thinking that the lawyer is wasting their time? Or the other side could simply object to the stage-setting questions as beyond the scope of the cross, an objection likely to find sympathy with an impatient judge. Or the judge might simply call the lawyer to the sidebar and say sternly: "Speed this along, Counselor."

The point is that a lawyer cannot count on having much liberty to do the kind of redirect that will have a real impact. In real life, redirect is choppy, disjointed, and hurried, with lawyers trying to make sure they get to everything on their list before the judge and jury lose interest or patience. It has a quality of doing first aid on a wounded soldier before the soldier is carried off the battlefield.

And that's only part of the problem. The next part comes after asking the witness, "Do you recall when opposing counsel asked you X and you said Y?" Typically, the lawyer's next question is "What did you mean by Y?"

If this form of redirect has any chance of producing a good outcome, the lawyer will need a fair understanding of how the witness will answer. But how will the lawyer know? If the point was not covered in the prep sessions, the lawyer will have an information deficit, and without knowing the answer, the lawyer might not be able to risk bringing up the subject on redirect.

Perhaps the lawyer will have a chance to meet with the witness before the redirect to go over the questions. In some courts, though, such a meeting would not be allowed. And even if it were, the lawyer might not have the opportunity if opposing counsel finishes cross-examination, say, early in the afternoon session right after scoring a whole bunch of points.

But let's assume the lawyer and witness can meet between the cross and redirect, that this meeting erases the lawyer's information deficit so that the lawyer knows whether the topic can safely be raised on redirect, and that the lawyer has a complete list of every problematic answer the witness gave on cross so that all the problems can be addressed. What then?

The witness might certainly be able to explain away some of the problematic answers, at least to the point of creating an issue of fact to get to the jury. But will it be effective to persuade the jury to throw away the impressions formed during the cross and buy into what the witness says on redirect? No matter how skillful the lawyer, the tone and tenor of redirect often can come across merely as an attempt to put a spin on bad facts. Maybe the jury will accept the answers, maybe not. Maybe the jury will hear the witness as candid and sincere. Or maybe the jury will see the witness as trying to recover from an “oops” moment but not really succeeding.

Recall Mitt Romney’s self-inflicted wound in the 2012 presidential election. When he thought he was speaking in a private conversation, unaware he was being recorded, he said this:

There are 47 percent of the people who will vote for [President Obama] no matter what. All right, there are 47 percent who are with him, who are dependent upon government, who believe that they are victims, who believe the government has a responsibility to care for them, who believe that they are entitled to health care, to food, to housing, to you-name-it. . . . These are people who pay no income tax. . . . My job is not to worry about those people.

Now assume that Romney were being cross-examined. In this hypothetical cross, the lawyer reads the statement, asks Romney whether he ever said that, and Romney—sticking to the conventional instruction to keep his answers short and not volunteer an explanation—answers yes. Admitting to having made this statement sounds awful. It makes Romney appear indifferent to the problems of the 47 percent and to being the type of person who, if elected president, would not spend any time trying to help them.

If Romney’s lawyer had to rehabilitate Romney, the hypothetical redirect, on Romney’s best day, might have gone something like this:

Q: Mr. Romney, do you recall on cross-examination being shown a statement in which you said that it wasn’t your job to worry about the 47 percent of Americans who are dependent on government, who believe the government has a responsibility to care for them, and who pay no income tax?

A: Yes. I recall that.

Q: What did you mean when you said it wasn’t your job to worry about those people?

A: Well, I wasn't talking about whether I would worry about them if I were president. Of course I would. What I meant was that it wasn't my job as a candidate to worry about whether I could get their votes, because the polls showed that those 47 percent had already decided to vote for President Obama, not for me. My job as a candidate was to worry about getting the votes of the undecided voters. It was an unfortunate choice of words on my part, but that's what I meant.

That's about the best Romney would have been able to do under the circumstances. Maybe it would sound convincing to some jurors. But maybe it would sound contrived, like something Romney and his lawyer cooked up during the break to put the best spin on a bad statement. And if that's what a juror believed, then the redirect would not be rehabilitative at all. It would make things worse. Not only would Romney have appeared indifferent to the 47 percent during cross, but he also would have appeared untrustworthy and incredible on redirect, simply because the explanation was not offered when the question was first asked on cross but when Romney's own lawyer asked the question on redirect.

The explanation is plausible enough, but its timing makes it suspect. How much better would it have been if, in this hypothetical cross-examination, Romney were to have said something like this:

Q: That is your statement, isn't it? You did say that about the 47 percent, didn't you?

A: Yes, but I wasn't talking about whether I would worry about them if I were president. Of course I would worry about them. I was only talking to some campaign donors who were concerned about how I would get enough votes to win the general election, and I was telling them that I was going to be focusing my campaign efforts on the undecided voters, not on the 47 percent of voters whom the polls already indicated were firmly committed to my opponent.

By offering the explanation when the question is first asked, it bolsters the witness's credibility. Spontaneity is more believable than something that seems like an after-the-fact orchestration between the witness and his lawyer. It also removes the taint of an unqualified yes answer at the very

moment the answer is given, thus denying the jury the opportunity to assign the worst meaning to the witness and to let that imagery sit in the jurors' minds for a few hours.

Those who subscribe to conventional witness-preparation instructions might argue that Romney, in this hypothetical, would never be permitted to give an explanation after answering the question *yes*, that the interrogating lawyer would move to strike everything after *yes* as being nonresponsive, and that the motion to strike would be allowed. This is hardly a justification for counseling a witness to stop after *yes* if an unexplained *yes* would poison the atmosphere or leave a misleading impression. Whether a motion to strike would be allowed would be in the judge's discretion. A judge would deny it if she believed that the information would come out anyway on redirect, that it would save time to let the explanation stand, that the explanation is fair under the circumstances, or that the explanation is helpful to the fact finder.

Even if the judge were to grant the motion to strike, the attempted explanation will signal the witness's lawyer that there's something to bring out on redirect and signal to the jury to stay tuned, that there's more to the answer than the simple *yes*. It will also signal to the jury to keep an open mind until the witness gets to give the explanation. And when the explanation is finally given, the jury will remember that the witness tried to give it earlier. This should suppress any juror's subconscious impulse to think that the lawyer and witness concocted the explanation during the break.

For still another reason, redirect is a poor antidote. Some exchanges between a witness and opposing counsel on cross simply cannot be rectified effectively on redirect. Let's revisit Kenneth Lay's startling statement on cross-examination that he did not know if he contacted witnesses to get his story straight. What was Lay's lawyer supposed to do with that on redirect? What would the redirect look like?

Q: Mr. Lay, do you recall when you were asked on cross-examination whether you had contacted any witnesses to get your story straight and you said that you did not know that you contacted any witnesses?

A: Yes.

Q: What did you mean by that?

What could Lay possibly say? Could he say that he did not know who was going to be a witness? No, not believable. Could he say that he did not understand the question? Also not believable—and too late to make that claim. Could he say that he didn't know what he meant? Not without looking foolish. Could he tell his lawyer that he really meant to say, "No, I didn't contact any witnesses to get my story straight"? Yes, but not without making the jury think that this was an afterthought, a specially crafted made-for-the-jury answer, unworthy of being believed and engineered solely to climb back out of the hole he dug for himself.

And what happens if the redirect goes as well as one can possibly hope? What happens when the lawyer can identify every answer that needs to be fixed, has no information deficit, can tee up the question with confidence that the witness will give a helpful answer, and has enough time to get through the entire redirect without trying the judge's or jury's patience? Can the lawyer sit down smugly when it's over, content in knowing that the damage has been successfully repaired?

Hardly. Just as night follows day, recross follows redirect. Recross gives opposing counsel the chance to explore the contrasts and contradictions between the witness's testimony on cross and on redirect. It gives opposing counsel the chance to point out that the testimony on cross was spontaneous and unrehearsed, while the testimony on redirect was developed after the witness and his lawyer met and conferred, at least in those jurisdictions that permit that. It gives opposing counsel the chance to reimpeach the witness with other inconsistent statements.

The point is this: If a witness is in the wrong frame of mind when first answering questions on cross, he can get bollixed in ways not easily fixable on redirect, even in the best of circumstances. But if the witness can be prepared in such a way as to give the best possible answer when the question is first asked, then he can avoid saying the wrong things and thus avoid the need to rely on redirect.

Redirect is first and foremost a damage-repair tool. The best thing for the witness is not to get injured on cross in the first place. In a perfect world, the witness will hold his own on cross, say everything that needs to be said, and get off the stand.

If redirect is primarily a damage-repair tool, then secondarily it is a barometer. It measures how well or how poorly the witness did on cross. The more ground that needs to be covered on redirect, the worse the witness did on cross.

In third position, redirect is a target. It zeroes in on all the vulnerabilities that opposing counsel exposed on cross-examination. It shows where the gloves were laid and the gashes opened. It shows opposing counsel exactly where to land the next punches on recross.

This is not to say that one should skip redirect and pretend that the witness did a great job on cross if she actually did a poor job. If the witness got hurt, the wounds need to be fixed. A skillful redirect can go a long way to bring the witness back to good testimonial health, and thus it is vital that lawyers know when and how best to use this tool. But if litigation is a battle, the aim of good witness preparation should be to train the witness to be a skillful soldier, to further the mission, and to return from the battlefield un wounded. If there are any wounds, the goal is for them to be few and minor.

Should the approach be any different for depositions? Civil cases are rarely resolved in trial, and most witnesses never testify outside of a conference room. In many cases, a witness's deposition testimony is seldom seen or heard after the deposition is taken. In the life cycle of a lawsuit, after the depositions are taken, the judge often shuttles the parties off to a mediator, the parties will spend a couple of days exchanging offers and counteroffers, a settlement agreement will be signed, and the depositions will be sent away to storage.

Whatever the case is for providing well-developed answers during cross-examination at trial, aren't the conventional witness-preparation instructions still the best way to answer questions during a deposition? Isn't there a net benefit in keeping deposition answers as short as possible, not educating one's opponent needlessly, not prematurely committing to a version of events if that can be avoided, and not ponying up information that could become fodder for cross-examination should the case go to trial? Most lawyers for deponents reserve their questions for trial, shunning the opportunity to question their own clients or friendly witnesses at their deposition. Do these lawyers believe there will be ample time to study the transcript, identify the problem answers, and figure out a way either to correct the answers before trial or to deal with them at trial in a way that accounts for whatever was said ill-advisedly in the deposition?

Logic counsels otherwise. Whether at trial or in deposition, the goal should be to give the best answer that the witness is capable of giving the first time the question is asked and not have to depend on after-the-fact opportunities to make corrections, explain things away, or improve on the answer. Depositions enjoy no special exemption. Why is this?

First and foremost, deposition testimony is highly consequential. In the first chapter, we saw how Bill Cosby's deposition had serious impacts, even years later. In later chapters, we'll look at deposition testimony from Paula Deen and Bill Gates and how their answers were pivotal, and not in a good way. Deposition answers are catalysts for settlement, shaping offers and driving acceptances. They alter the risk analysis and the willingness to go to trial. They are the building blocks for summary judgment. They strengthen cases or weaken them. And if a case needs to be tried, the bad deposition answers will take starring roles.

But beyond this, depositions are not so easily correctable. Rule 30(e) in the Federal Rules of Civil Procedure and many state counterparts provide that, after the deposition is fully transcribed, the witness may, within thirty days, make "any changes in form or substance which the witness desires to make," along with "a statement of the reasons given by the witness for making them." But these postdeposition changes—commonly tendered in an errata sheet—are not a dependable solution for poorly answered questions. Some courts interpret the rule as permitting a witness to correct only errors in transcription. Other courts will not permit a correction to serve as a basis for opposing a summary judgment motion, unless the correction does not actually contradict the original answer. Judges who take a dim view of errata sheets have been known to assert that depositions are not take-home exams and that witnesses should not be allowed to pore over the questions at their leisure to come up with answers they wish they had given earlier.

Other courts, though, will permit a witness to make substantive changes that contradict original deposition testimony, even without a transcription error, but only if the witness gives a credible explanation for the change, with the judge deciding whether the explanation is credible enough. And even in courts that allow a witness to tender an errata sheet that changes a no to a yes on a material point without having a good explanation, judges will treat the change as a legitimate reason to reopen the deposition.

Once the deposition is reopened, the interrogating attorney can question the witness about the change, the reasons for the change, or anything else that might impeach the witness's credibility. This of course opens up the witness to all sorts of embarrassment, such as whether the idea for the change came from the witness or the witness's lawyer, and whether the witness thought that the original answer was not as helpful to the case as the one in the errata sheet. When all is said and done, most often a witness or witness's counsel who gives a different answer in an errata sheet will wish that the witness had given that answer the first time around.

If errata sheets are outside the range of realistic and effective corrective options, what else is left? If the other side relies on the deposition testimony to support a motion for summary judgment, the lawyer can try creating an issue of fact with an affidavit from the witness that clarifies the deposition testimony. But many courts will not permit a party to create an issue of fact with an affidavit that contradicts testimony the party gave in a deposition. And despite an argument that the affidavit only clarifies and does not contradict the deposition, the court may disagree and grant the other side's motion to strike it.

So when corrective affidavits offer little hope, the witness might have no options at all, other than to keep his fingers crossed and pray that if the case needs to be tried, the other side will not have the presence of mind to reread the deposition before the witness takes the stand. Good luck with that.

All this notwithstanding, believers in conventional methods might still feel uncomfortable having their witnesses open up with well-developed answers to an opposing counsel's questions. Those believers might still feel that looser lips sink more ships than tighter ones and that the time to give the best and most complete answer is when the witness is questioned by her own lawyer, not by the other side's lawyer.

For lawyers who believe this, perhaps the reason it might work for them is that there's a good chance the lawyer on the other side has prepared his client the same way so that they are both operating with the same competitive disadvantage. But if the lawyer on the other side breaks away from the less-is-more philosophy and counsels his client to give the best answer the first time the question is asked, and if all other things are equal, that's the lawyer who has the edge. A big one.