We've all been schooled on time-tested ways for preparing witnesses to answer questions from opposing counsel. But are the conventional witness preparation instructions really time-tested or are they timeworn? Do they help clients weather an attack, or do they make clients more vulnerable to the attack?

Conventional witness preparation instructions counsel clients to answer only the question asked, not to volunteer information, not improve on the question, not to answer the question that the witness thinks should have been asked but wasn't, and to keep the answers short. In conventional preparation, clients are told not to try to win their case when opposing counsel is asking the question, just to try not to lose it; if the client's lawyer feels there is anything else the witness should have said, the lawyer will ask about it on redirect.

Conventional preparation thus virtually ensures there will be redirect. It depends on redirect. It anticipates that the witness will say as little as possible, a strategy that practically guarantees that the lawyer will want the fact finder to hear more. It also anticipates—because experience has shown this to be so—that witnesses who follow the conventional advice will invariably answer at least some questions in a confusing or misleading way or simply answer them badly. Consider Kenneth Lay.

Example: Kenneth Lay

In 2004, Kenneth Lay was indicted for securities and wire fraud for his role as chief executive officer 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 20,000 jobs, the loss of billions in shareholder value and retirement accounts, and the death of 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. His trial ended in a conviction on nearly a dozen counts. While awaiting sentencing, Lay died, reportedly from a heart attack. About two months before he died, Lay testified in 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 need not have been 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 Lay 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’s lawyer had an enormous job to do on redirect. Lay had said so many things on cross. Lay had to have hoped that his legal team was taking copious notes and putting an asterisk next to everything that needed fixing. But 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 every question the prosecutor asked, his lawyer had to have been thinking all of the following in the instant between the prosecutor’s question and Lay’s answer: How will Lay 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 my appellate rights?

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 begin the redirect that afternoon.

Of course, the lawyer might have felt comfortable letting his guard down somewhat, figuring that, if Lay listened carefully during witness preparation, he would not say very much but would keep his answers short and not stray beyond the scope of the question. But experience would have taught the lawyer that, despite how well Lay absorbed those instructions, no witness gives flawless testimony on cross-examination. Some redirect will be required.

And with every answer Lay gave, the lawyer had to have been thinking all of the following in the instant between Lay’s 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?

Listening to one’s client being cross-examined is no cakewalk. It’s hard work. It requires multitasking in the extreme. It requires channeling all powers of concentration into each question and each answer. Each turn of a question and answer requires multiple levels of analysis, making a number of decisions, and, finally, answering the following:

- Did the witness just say something that I need to fix?
- Do I know enough to know what questions to 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 the task of 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 question and answer from his list of things to do on redirect?

Redirect as Cure

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 that opposing counsel did on cross. If a lawyer needs to conduct redirect, it means that the witness has been injured. Wouldn’t it be much better to prevent the injury from occurring in the first place and to make redirect unnecessary?

Redirect heals only imperfectly. 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 them 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 corrected. Ordinarily, a cross-examination that produces only one bad answer will make for a far 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 that 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 corrective testimony, it makes sense and does so in a way that 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 corrective 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 so if I can get you to give a better answer.” Is this setup going to help the next answer make sense? Will it earn the jury’s sympathy and trust?

Unfortunately, many things work against a lawyer’s ability to do 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.

Judges do this in very effective ways. If the judge feels the lawyer is taking too long of a windup before throwing the pitch, the judge might ask: “Counsel, didn’t we go over this on direct?” Saying that to the lawyer in the jury’s presence tells the jury that the lawyer is wasting 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 with redirect. 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 the question. But how will the lawyer know? If the point wasn’t covered in the prep sessions, the lawyer will be at a major information disadvantage. If the lawyer doesn’t know whether the witness has some good explanation for the unfortunate answer given on cross, the lawyer won’t be able to risk bringing up the subject on redirect.

Perhaps the lawyer will have a chance to meet with the witness between the cross and the redirect to go over the questions on the lawyer’s list. In some courts though, such a meeting wouldn’t 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 that the lawyer and client can meet between cross and the redirect, that this meeting erases the lawyer’s information disadvantage so that the lawyer knows whether a topic can safely be raised on redirect, and that the lawyer has a complete list of every problematic answer that the witness gave on cross so that all the problems can be addressed. What then?

The witness might certainly be able to offer explanations or clarifications 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 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.

Example: Mitt Romney

It might be well to 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.

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If Romney's lawyer had to rehabilitate Romney, the hypotheti-
cal 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 depend-
ent on government, who believe the government has a re-
sponsibility 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 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 go-
ing to be focusing my campaign efforts on the undecided
voters, not on the 47 percent of voters who the polls already
indicated were firmly committed to my opponent.

Offering the explanation when the question is first asked
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
motives 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 interrupt
that answer or 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 the word “yes” if an unexplained “yes” would poison the
atmosphere or leave a misleading impression. The lawyer might
not interrupt the explanation, or if there is a motion to strike, its
allowance would be in the trial judge's discretion. A judge who
is a purist might perhaps allow it, but many judges would not,
figuring the information will come out anyway on redirect and
that it will save time to let the explanation stand.

Even if the judge were to grant the motion to strike, the at-
ttempted explanation will inform the witness's lawyer that there
is something to be said on redirect, thereby erasing the lawyer's information disadvantage. It will also signal to the jury to keep an open mind until the witness gets to give the explanation on redirect. 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 to a cross-examination that has gone badly. 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 also too late to make that claim. Could he say that he didn't know what he meant? Not without looking foolish. Could he say 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.

The Best Possible Redirect

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 disadvantage, 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 her lawyer met and conferred, at least in those jurisdictions that permit that. It gives opposing counsel the chance to re-impeach 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, the witness can get bollixed in lots of 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 the witness can avoid saying the wrong things and thus avoid the need to rely on redirect.

If redirect is primarily a damage repair tool, it is, secondarily, a barometer.

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, it is, secondarily, 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 the witness did not do a great 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 unwounded. If there are to be any wounds, the goal is for them to be few and minor.

Depositions

What about depositions, though? Most cases rarely get resolved in trial, and most witnesses never testify outside a conference room. A witness's audience is seldom a judge or jury. Most often,
it is a court reporter and videographer. In the life cycle of a lawsuit, after the depositions are taken, the judge will often shuttle 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 fulsome 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, not pawning up information that could become fodder for cross-examination should the case go to trial, and the like? 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 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?

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 30 days, make “[a]ny 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 post-deposition changes—commonly tendered in the form of 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 supporting or 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 pony up 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 feels a need to tender a different answer in an errata sheet will later come to wish quite strongly that the witness had given that answer the first time around.

If errata sheets are outside the range of preferable 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 re-read 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 fulsome 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.

If you believe this, perhaps the only reason this might work for you is that there’s a good chance the lawyer on the other side has prepared her client the same way so that you’re 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 her 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. ■