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ON BEING A GOOD WITNESS*

Douglas F. Johnson
Separate Juvenile Court of
Douglas County, Nebraska
600 Hall of Justice
Omaha, Nebraska
444-7881
djohnson@co.douglas.ne.us

In daily life, everyone decides whether or not someone else is trustworthy. One sizes up another person in terms of how one carries oneself, how one speaks, how one states what one has to say, how one reacts to questions, and whether or not the person is believable. So too in court, the same process occurs. A judge must determine whether what you have to say is worth listening to, i.e., is it probative? Is it credible? Is it believable? Useful? Helpful to decide the truth? Is it first-hand knowledge? Does it tend to prove an issue of the case? Credibility of a witness is always at issue.

I. THE NATURE OF BEING A WITNESS

A. The rules of direct examination require that the witness do the testifying without help or suggestions from the examiner

B. The cross-examiner can compel yes or no answers. She can prevent a witness from being unresponsive or from giving narrative type answers. She can also deter a witness from testifying in a field where the witness would be more comfortable. In short, the cross-examiner has the power to be in complete control.

C. On direct examination, the complete opposite prevails, since the rules require that the examiner let the witness "travel the road by oneself".

II. THE IMPORTANCE OF A GOOD WITNESS.

Most litigation is won or lost by direct testimony. Evidence must be presented in a believable manner.

*These concepts are the product of many sources. As Judge James Farris of Beaumont, Texas, stated: "If you take one idea and use it, it's called plagiarism. If you take two or more ideas, it's called research." So, this is research – sort of!

Example: The criminal defense lawyer on television who scores a success by adept cross-examination with what would otherwise appear to be a sure loser is just that, TV. However, during this brilliant display of cross-examination one of the State's witnesses usually breaks down and admits
committing the murder himself. In real life, most litigation is won or lost as a result of direct testimony.

The lawyer must accept the witness as he or she is. The witness may be a likeable, convincing, articulate person who projects well, or be the complete opposite.

If you are looking for educational examples of testifying in Court, then avoid television court and law shows! If you find such shows entertaining, go ahead and watch them. Lawyers and judges seem to think that therapists, psychologists, and psychiatrists ought to be just like Frasier . . .

III. WITNESS PREPARATION – FIRST OPINIONS COUNT.

The witness paints a picture of the occurrence in the mind of the Court through one's choice of words and through one's speaking voice.

Questions:

1. Does he answer questions promptly, or does he hesitate?
2. Does she exaggerate or does she play down?
3. Is he confident or meek?
4. Is the witness pleasant or unpleasant?
5. Is the witness sincere? Polite? Crude?
6. What sort of posture does this person have?
7. How is the witness dressed?

All these things go to make up a total person and create impressions in the mind of one observing the witness.

IV. COMMON PROBLEMS AND CHARACTERISTICS OF WITNESSES

A. THE LONG-WINDED WITNESS. This is the witness who feels that every answer to a question requires a speech. She always provides a great deal of unnecessary background material prior to answering any question.

This type of witness is dangerous because she invariably supplies abundant material for cross-examination that can create doubts and problems that otherwise would not exist. In addition, an overly talkative person is the least persuasive. A judge will have a tendency to discount much of what she has to say which may involve important segments of the case. The result of the entire examination is a clumsy, weak contribution to the case in chief.

B. THE SHORT-WINDED WITNESS. When this witness takes the stand, he chooses that time to imitate a sphinx. By giving one-word answers, he forces the examiner to "drag it out of him" and completely lose effectiveness. Assuming that the examiner overcomes the barrage of objections to leading questions and gets testimony bit-by-bit, he will find that this contribution of evidence has been considerably depreciated. It might have been of significant value otherwise. An impression may even be created that the lawyer is attempting to prod the witness into testifying to something that he is not quite prepared to say. This also results in a lack of credibility.

C. THE OPINIONATED WITNESS. This is the type of person who feels that a good partisan argument is essential to a trial or hearing. He often uses adjectives, metaphors and hyperboles. On cross-examination, these exaggerations can be shown for what they are. The witness may have little persuasive value.

D. THE ANTAGONISTIC WITNESS. This is the type of person who views litigation as a personal affront. If this witness is a party to the lawsuit or has testified on behalf of a party, then he views the other side as the enemy who has committed a serious and deliberate wrong. He cannot conceal his hatred and contempt for everyone connected with

the other side and does not hesitate to lash out at anyone he identifies as belonging to the "enemy camp". This partisan attitude will cause a judge to discount a great deal of the testimony.

E. THE HAM. This type of person is a frustrated actor and usually lacks any talent. The witness stand becomes a stage in the courtroom from which to "act" out his role. This witness will use exaggerated speech, grimaces, and words with which he is not particularly familiar - in general, he hams it up. This testimony is generally discounted.

F. THE WITNESS WITH STAGE FRIGHT. This witness has a temporary condition that causes him to completely freeze on the witness stand. He may be a talkative person naturally, but suddenly he is panic-stricken and unable to communicate intelligently. His mind is numb with fear. There are varying degrees of panic, but they can lead to unintelligible or inappropriate answers.

G. THE SHIFTY-EYED WITNESS. This is the person who has great difficulty in looking at the face of anyone in the courtroom. She will look at the ceiling, the opposite wall, or any other place in order to avoid looking into anyone's eyes. She may look at the floor for comfort. Some judges and attorneys have heard or been taught that people who do not look them in the eyes are liars. (Erroneous, but occurs.)

H. THE VERY IMPORTANT PERSON. This can be a condescending person who makes it clear that she is bestowing some of her valuable time in court in spite of a busy and important schedule. This witness usually intimates that her station in life is obviously more important than any one present in court.

I. THE THINKER. Some persons allow considerable time to elapse between the time a question is asked and the time the answer is given. This may be interpreted that the witness is not too sure of himself or may be making up an answer. Extreme slowness is unconvincing and lacks the spontaneity that an honest answer usually has.

J. THE DISORGANIZED THINKER. Some persons have difficulty in putting their thoughts into words even though they are intelligent. Before such a person can make a point, there will be other points that he considers prerequisite. Before he ever gets to the important preliminary point, to say nothing of the main point, the listener has tuned him out. This type of person may suddenly go off on a tangent and must be led back to the point in order to keep any continuity at all.

K. THE QUALIFIER. This type of witness is cautious by nature and finds it difficult to give an unqualified responsive answer. He constantly uses such expressions as "I think it was that way" or "As I recall it -" or "I believe it was". Note: Credible testimony is not speculation, guess or conjecture.

L. EVERYONE'S FRIEND. There are persons who scrupulously try to avoid offending anyone. They want to be everyone's buddy. This type of person will want to please even the opposing lawyer.

V. GENERAL INSTRUCTIONS FOR WITNESSES A/K/A "COMMON SENSE"

A. Do not chew gum (it is surprising how many do in Court).
B. No flashy jewelry or overpowering fragrance.
C. General grooming in conformance with local practice.
D. Do not slouch in the chair - it shows indifference and disrespect.

E. Have a pleasant look on one's face.
F. Appear to be attentive and interested.
G. Be courteous.
H. Use words with which you are familiar, be as natural as possible.
I. Answer specifically.
J. Do not attempt to outsmart an opposing lawyer by giving tricky or evasive answers.
K. Answer the question asked.
L. Do not lose your temper.
M. Say "yes" or "no" instead of "huh-uh" or "yeah".
N. Consider the occasion solemn and avoid getting "chummy" with counsel.
O. Be yourself – unless you violate A through N!!

VI. IT ALL BOILS DOWN TO THE EVIDENCE. A judge can only make findings about what is true or not. A judge decides what to order for children or parents based on the testimony or exhibits that are received into evidence.

In order for evidence to be received, it must be:

1. MATERIAL - the testimony must relate to the issues of the case. An issue is created in the pleadings whenever an allegation is made. An issue exists whenever the parties want a judge to make a decision in the life of the case.

2. RELEVANT - the testimony sought from the witness on direct examination must be relevant. Relevancy means that the testimony must have some logical, probative weight or value tending to prove or disprove some fact in the case. Relevancy is the opposite of guess, speculation, and conjecture.

3. COMPETENT - the testimony elicited from the witness must be competent. Competence means a basic or minimal ability or qualification of a witness to testify, or that the information is authentic. That is, it must not be barred by some rule of evidence, nor could it be privileged communications such as those between an attorney and a client.

4. OBJECTIONS. Objections are made for one or a combination of reasons. Objections can be raised during the taking of depositions, motions, or the trial itself, or at any time during the pendency of a lawsuit.

An objection is directed only at the judge. By objecting, a lawyer requests a ruling on a matter concerning a rule of evidence or a procedural problem. The purpose of the objection is to prevent prejudicial evidence from being accepted by the Court. It also preserves for review on appeal a contention that the evidence was erroneously admitted or excluded.

VII. THE JUDGE'S ROLE.

1. **NRS Section 27-611 (Reissue 1995)**

a. The judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to
i) Make the interrogation and presentation effective for the ascertainment of the truth,
ii) avoid needless consumption of time, and
iii) protect witnesses from harassment or undue embarrassment.

2. **Code of Judicial Conduct**

Canon 3:

B(3) A judge shall require order and decorum in proceedings before the judge.

Canon B(4). A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials and others, subject to the judge's direction and control.

Canon B(5). A judge shall perform duties without bias or prejudice.

Canon B(7). A judge shall not initiate, permit or consider ex parte communications or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . .

Commentary: A judge must not independently investigate facts in a case and must consider only the evidence present.

N.B. If a lawyer exhibits unethical behavior, he or she may be reported to the Disciplinary Review Board of the Nebraska Supreme Court.

If a judge shows unethical behavior, he or she may be reported to the Judicial Qualifications Committee of the Nebraska Supreme Court.

VIII. KEEPING A GOOD RECORD.

A court reporter can only record the audible word and cannot insert a narrative description of what is occurring during the taking of evidence. Example: "I saw him out of the corner of my eye running in that direction." This begs the question: "which side?" Or, "her breath smelled like alcohol" – whose breath? The record will be meaningless without further clarification by the witness.

IX. TOP TEN RULES FOR TESTIFYING

1. Take your time – only one person may speak at a time!!
2. Remember you are making a record: be specific and precise
3. Tell the truth
4. Be relentlessly polite
5. Do not answer a question you don't understand
6. If you do not remember, say so
7. Do not guess
8. Keep it simple
9. Be careful with documents and prior statements
10. Use your counsel

Or, if the top ten are too much, use THREE SIMPLE RULES:

1. LISTEN TO THE QUESTION.

This is where lots of witnesses get into trouble. The problem is many lawyers ask poor questions, both on direct and cross examination. For you to answer any question, make sure

you know what is really being asked. Then you reduce the chance of stumbling into some unknown thicket. If you don't understand a question asked, ask for clarification.

2. ANSWER THE QUESTION ASKED.

Listening to the question is not easy. Remember to breathe, take your time, and listen to the question. Do not worry about a prior question or questions in the future. Answer the question that was asked, not some other question. Do not try to dodge difficult questions. Do not object to the questions - your job is to be a witness, not another lawyer.

3. TELL THE TRUTH.

-Beware of saying anything that is technically accurate but is still misleading. You never want to seem tricky or devious.
-Always admit what is obvious, unless it is not true.
-Do not sugar-coat your answers, particularly to uncomfortable questions.
-If you do not know the answer to a question, say so.
-If you do not remember something, say so, don't guess.
-There is nothing improper about not knowing or not remembering. On the other hand, never claim you do not know or you forgot something to avoid answering an uncomfortable question.

X. IF YOU ARE AN EXPERT WITNESS

1. Prepare to review your qualifications, background, achievements, writings, and experience in detail.
2. If there is anything unfavorable in your background that would tend to discredit your opinions, be prepared to be questioned on it, or any previous opinions/writings that may appear to be in conflict with opinions with this case.
3. Be prepared to list all information and materials upon which your opinions are based.
4. Opinions must be based on reasonable probability or reasonable certainty within your particular field.
5. Be prepared to explain what assumptions you have made and why.
6. Be prepared to defend your assumptions and opinions.
7. You will be asked to explain why you were hired/subpoenaed in this case. You will be questioned about what specific issue you were asked to address or what you were asked to do.
8. Be prepared to explain your fee and expense arrangements in the case.
9. When asked questions, your answers should be as affirmative as the subject matter reasonably permits. If is permissible to correct mistakes as they occur to you. As a general rule, you cannot be asked leading questions.
10. When the opposing lawyer is examining, do not answer yes or no unless that is clearly your answer. If an answer must be conditioned or explained, then do so. But, avoid being argumentative or appearing to be a smart-alec about your answers. Avoid exaggerations.
11. Avoid involvement in arguments between attorneys over objections. Remain silent until instructed as to what you are supposed to do.
12. The rules do not permit the other attorney to abuse you. Let the prosecutor or judge decide the difference between abuse and tough questions, and accordingly will make the necessary objections. You are required to answer tough questions if they conform to the rules. Answer all the questions that you can. "I don't know" or "I don't remember" are acceptable answers if true.

13. You should be prepared to explain how much or what percentage of your work has been for the State and how much has been for defense.

14. An examiner may use obscure technical terms to throw you off. You should be willing to readily admit unfamiliarity with a term and/or ask the attorney to define or explain the term he is using.

Example of direct examination:

Please state your name
Tell me about your educational background
Employment, duties, length of service, other training
Are you familiar with the case entitled "In Re Interest of Susie Juvenile"?
How did you become familiar with this case?
What steps did you take to investigate the case (who, what, when, where)?
Did you rely on other sources of information for your opinions regarding the safety and best interests of the child? What sources?
How did you gather the information?
Did you rely on the information?
Is it standard procedure to rely on such information? Did you find it reliable?
Do you have an opinion with respect to the safety and best interests of the children? What is your opinion? What is the basis for your opinion?

Example of offering an exhibit:

The photograph or document, marked as Exhibit 1, do you recognize it? What is exhibit 1? (a photograph). What does this photograph show? Where was this photograph taken? Is this photograph substantially similar to the condition of the house when you did an on-site inspection? Your Honor, I offer Exhibit 1.

EXPECTED CROSS-EXAMINATION QUESTIONS:

1. What is your education, employment history?
2. What is your experience as an expert?
3. What proportion of your experience as an expert has been for plaintiff or defense?
4. When was your first contact with opposing counsel and what were you asked to do?
5. What time have you spent and what have you done?
6. What information, documents, depositions, and exhibits, or other information have you been furnished?
7. What assistance have you received from others?
8. Do you have any other opinions than the ones that you are asked regarding the issue at hand?
9. Give each opinion and your basis for it, including any support in the literature for each of such opinions.
10. What data is inconsistent with each opinion?
11. Are you a psychologist (if you're not a Ph.D.)? You don't have a Ph.D. in psychology?
12. You aren't a counselor (if you don't have an M.A.)? You don't have a master's degree in counseling?
13. You aren't a licensed mental health practitioner? If so, you just have a Preliminary Licensed Mental Health Practitioner license?
14. Your training really amounts to in-service education through your job?

REMEMBER: You have important information that can help the judge make a good decision. It is up to the attorney to ask the proper questions to get your information or opinion into evidence.