The Professional Parliamentarian as Expert Witness, Part II: Preparation

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From my previous article, "The Professional Parliamentarian as Expert Witness" in the last issue of the NP, Volume 73, No. 4, we observed that a professional parliamentarian may be engaged as a procedural or governance expert in a wide variety of venues. We also examined being comfortable with the engagement, the lawyers and our qualifications as an expert in the particular area of procedure. In this article, we continue reviewing some of the things required to prepare for testimony, especially under cross-examination.

Testimony for a deposition, hearing or trial can make anyone anxious. Despite the pressures, testifying as an expert can be very rewarding. I've found the work extremely interesting, especially when it may involve providing clarity to existing procedures. As with any very rigorous work, it hones your skills and gives you new perspectives on governance and procedures. With proper preparation, a professional parliamentarian can look forward to the time on the witness stand, not with trepidation, but with anticipation.

Before the Testimony

Although individual attorneys prepare witnesses differently, no one goes into testimony without any preparation. Being prepared relieves anxiety and solidifies your expert position. Preparation is necessary if you are to do an effective job for your client.

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Just as it is essential to have access to all relevant documents before writing a parliamentary opinion, it is even more crucial to review the information in preparation for testimony. Your legal council may withhold the documents until he is sure that you will be deposed/testify (to protect their case and you as well), but it is the witness' responsibility to assist counsel in compiling a list of documents—both public and private—that you may need to review when (or if) you get them.

During the process of preparing me to testify as an expert witness, legal counsel told me there are only three rules for testimony:

1. Tell the Truth
2. Tell the Truth
3. Tell the Truth

Telling a lie is just plain wrong and goes against the NAP/AIP jointly-adopted Code of Ethics. And false testimony rarely goes unnoticed for long; keeping a fabricated story straight takes a great deal of work and energy. While you may or may not be under oath, depending on in which venue you may appear, witnesses who testify by manipulating the facts—either

by failing to include something or testifying to a fact contrary to their own beliefs about what is true—risks at least a damaged reputation and at most can be referred to the authorities for prosecution.

Do not be surprised if you are asked about the same item many different times and in many different ways. This technique is used to ensure that all the information about the situation is exposed and available for further questioning. Most legal counsels work with their witness prior to the actual testimony to train the witness on these methods.

As you prepare your statement, structure it as a story. A good story should contain[1]:

- A statement of the facts – both known and undeniable;
- Details which support the facts;
- An explanation of why persons did what they did;
- Plausible statements which are consistent with common sense;
- An appeal to a sense of justice and fairness.

Here is an example of how the parliamentarian might follow this story structure in response to a question: "The bylaws require elections to be held every November. The bylaws also allow officers to be re-elected and specify no term limits. In November 2002, the directors failed to have an election and the current officers remained in office. These officers have led the organization since 1989. In November 2003, no election was held and the same officers remained in office. This continued in 2004, 2005, 2006 and 2007. In February 2008, the secretary passed away and the officers elected a replacement as specified in the bylaws. Several directors disliked the replacement and pointed out that the secretary was improperly elected. The officers stated that the replacement of the secretary was consistent with the precedent established beginning in 2002 and, even if elections were held, the same officers would be re-elected just as they had been re-elected since 1990. And the bylaws do allow the officers the right to fill a vacancy among the officers until the next election. The directors want an election now, not in November as proposed by the officers. What is fair? It is my expert opinion that . . ." You can fill in the rest of the testimony to follow the "story-telling" model proposed above. Unless the facts revise the story (an unincorporated bylaws amendment allowing viva voce re-election of the current officers, for instance), you can continue developing it to help your client with his side of the case.

If you discover new information as you are preparing for testimony, or if you hear testimony in court prior to your testimony that may change what you say, notify your attorney. Lawyers do not like surprises during testimony. Surprises should be avoided—or at least limited—as

much as possible. Make sure the communication lines between you and your counsel are as open, free-flowing and as unambiguous as possible.

Preparation for Cross-Examination by the Opposing Side

Preparing for cross-examination by the opposing side is a bit more difficult. You do not know how they are structuring their case, nor do you know what questions they will pose. In their book, *The Effective Deposition: Techniques and Strategies That Work (2007)*, authors Malone, Hoffman, and Bocchino state that brief succinct answers to verbal questions are the best way for a witness to respond to his/her own or opposing legal counsel. The questioning may be in regards to an opinion that you wrote previously (either specifically for this case or elsewhere) or from a line of questioning about the procedure in dispute. Malone et al. communicate that most questions can be answered in one of seven "shortest, correct" ways[2]:

1. "Green." "Two o'clock." "In the basement." A short succinct answer to questions like "what color is your car," "when did you return," or "where do you keep your cancelled checks" fulfills the question without giving additional paths for further questions to be developed and followed up. Take, for example, a question about the motion to reconsider used during a meeting. You can answer the question, "*Reconsider* was used properly" or you can respond "*Reconsider* was used properly in this situation," (which will inevitably lead to further questioning on other situations) or your reply could be "*Reconsider* was taken up within a quarterly time interval and the suspension of all of the actions to be taken were properly lifted." (How many additional questions do you wish to answer after your first response!) The first response sufficiently answers the question without providing potential "rabbit trails" to be chased down.

2. "Yes." If a question can be answered in the affirmative, answer it that way. If the attorney needs additional information, he will ask for it. It is not considered rude to just answer "yes."

3. "No." Likewise, answer questions with no, if that is all it takes.

4. "I don't understand the question." If you do not completely know how to respond, reply this way. You are not required to answer a question if you do not know what opposing counsel is trying to find out—especially if there are multiple ways to answer the question. Nor are you required to assist the attorney in re-framing the question, e.g. "Are you asking . . . ."

5. "I don't know." Although a witness wants to respond to every question, no person knows every answer and that is okay. Don't try to guess or assume an answer when you truly do not know. Do not speculate.

The expert witness is not expected to know all the answers, only the ones that are in his/her area of expertise. This is where you need to know the boundaries of your knowledge and disclose that to your client during your employ.

6. "I don't remember." Just like number 5, witnesses do not like to admit that they do not have perfect memory. Again, you are not expected to remember every fact, every time. If you cannot recall, just say "I do not remember."

7. "I'd like to take a break." If asked a question and you really do not know what you are supposed to do, you can ask for a break so that you can consult with your counsel, stretch your legs, and collect your thoughts. As a witness, you need to appreciate and learn the appropriate use of breaks. Both sides and possibly the judge may make the determination as to what happens, but if you need a break, say so.

These answers are intended to simplify the expert witness' cross-examination and make him/her comfortable while giving testimony. Your lawyer may even go through a mock cross-examination with you prior to giving testimony to make you see what it is like being "examined," and to get you comfortable using the "seven simple answers."

Relax, but take it seriously

Being an expert witness is a very important job and you can do it very well. You want both sides of the case to understand that. While you shouldn't expect the opposing counsel to try to trap you, remember that they aren't your friend—they are working for the other side. Make sure you are telling your story and not theirs, but don't be defensive.

If you can reduce your anxiety level and depend on your legal counsel for direction and guidance, the testimony will go smoothly. Proper preparation is the key to minimizing your stress level as much as you can. Make yourself comfortable with the content of your testimony so that you can practically recite it in your sleep. You do not need to worry about the procedural issues that may arise while testifying; that's your attorney's job. And any procedural issue should be minor and not interfere with your testimony.

If you succeed in convincing the panel/arbiter/judge/jury that your side had the stronger case, you cannot gloat. And if you fail to convince the decision-makers of your side's case, you cannot take it personally. As an expert witness, all you are doing is lending your expertise on procedure and/or governance to support a client's case. Although people's lives may not hang in the balance, sometimes money and legal precedent may be involved. What you do as an expert witness could be very important, not only to this case, but to many other situations to come.

Being a parliamentary expert wit-

ness can be a fun and exciting experience. Once your testimony has become a matter of public record, it can provide a big boost to parliamentary law in general and your reputation as an expert in particular. It certainly doesn't do any harm to your resume either — provided you're ready to bear all the responsibilities it entails. ★

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Endnotes

1. These components of a good story are from Steven Lubet (2004), pp. 1-10.
2. The questions are a paraphrase from Malone, et al. (2007), pp. 200-205 with explanations by the author.

Works Cited

Lubet, Steven, 2004. *Modern Trial Advocacy: Analysis and Practice*, 3rd ed., Louisville, CO: National Institute for Trial Advocacy.

Malone, David M., Peter T. Hoffman, and Anthony J. Bocchino. 2007. *The Effective Deposition: Techniques and Strategies That Work*. Louisville, CO: National Institute for Trial Advocacy.