

## **The Whole Truth**

During my testimony one thought is consistently in my mind: “Is this answer that I am about to give the *whole* truth?” I find that one thought to be an incredibly useful benchmark. It helps me sort through exactly how to answer the question: whether to answer with a simple “yes” or “no”; whether to answer the question but with a clarification; or whether to answer by pointing out a problem with the premise of the question. Under cross a key issue is whether, when, and how to fight. And “fight” is not too strong a word: the issue is how to maintain one’s objectivity and credibility on the stand when the questions are designed to expose every weakness, and often are designed to create the appearance of weakness where there is none. The extent to which a cross examiner asks the witness to depart from the whole truth dictates the response.

Perhaps counter intuitively, the issue is the same on direct: the difference is only a matter of degree. No matter how meticulous the preparation for direct, in real life each direct examination takes on a life of its own. Attorneys love to improvise, and generally the flow of testimony in court gives great reasons to do so. In the process questions change, and sometimes get fouled up. In real trials the one thing that will NOT happen is a direct exam that follows the rehearsal.<sup>1</sup> The whole truth is an invaluable benchmark all the time, but especially while ad-libbing.

The whole truth is equally useful in preparing to testify in mock trial. I find, however, that in mock trial the concept of the whole truth is often, and unfortunately, under-emphasized, generally due to reasons that are inescapably built into mock trial. In mock trial the witnesses play roles and “testify” to fiction. Out of respect for actual trials and the real-world witness oath, the mock trial witness oath omits, necessarily, the requirement to testify to a fictional “whole truth.”<sup>2</sup> As a result, in mock trial the concept of the whole truth rarely comes up. As a further result, the emphasis in mock trial witness prep is often more on presentation skills and role playing than conformity with the “whole truth” of the mock trial case. This can lead to any number of errors: the witness can be argumentative; or may never give a straight “yes” or “no” to the simplest question; or plays ball with the direct examiner but treats the cross examiner like an enemy. The witness’s credibility and score often suffer. Put simply, the concept of the “whole

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<sup>1</sup> Admittedly, in mock trial direct exams tend to follow a script more than in real trials—but the top-scoring teams consistently show considerable flexibility on direct, particularly the defense.

<sup>2</sup> Note that the witness oath has been changed and is new this year. The new oath emphasizes conformance with the witness statement, and prohibits adding “. . . material facts that are not contained in the Case Problem . . .”, i.e., the oath emphasizes the prohibition of unfair extrapolation. See the Rules of Competition: the witness oath at p. 26; and Rule 6.5 Unfair Extrapolation.

truth” is just as useful for use in mock trial as a mental benchmark to guide testimony as it is in real trials.

Here are four coaching tips for witnesses to keep in mind based on the importance of the “whole truth” in mock trial.

**Listening is by far the most important skill for a witness**—and it is much more important than presentation skills. One can’t tell the “whole truth” unless one has listened most carefully to the actual question—not the question that is expected, not the question that was rehearsed, not the question telegraphed by the attorney during the course of the exam, but the actual question that is asked. Further, one can’t tell the “whole truth” until one has carefully weighed and considered the answer against the benchmark of the whole truth. In effect, one must listen to the answer—in effect, rehearse the answer—before it is spoken in order to do this: and this is the most important reason to pause before answering.<sup>3</sup>

**The direct examiner is not your friend: the cross examiner is not your enemy**, even if it feels like s/he is. Generally, treat each the same.<sup>4</sup> Each may ask bad questions, each may need clarifications, and each may ask questions that require a sharp disagreement—however unlikely that may be on direct. Remember this: witnesses in real trials have a responsibility that attorneys do not, to tell the whole truth—and the jury’s principal job is to weigh each witness’s credibility. In mock trial the scoring panelists replace the jury, but at some level they weigh witnesses’ credibility just as juries do. Attorneys have a different responsibility than witnesses: they put on their client’s case within the rules of evidence and procedure. Attorneys present evidence through the witnesses’ testimony and argue the case. The witnesses present the facts with as much credibility as they can muster—meaning in conformity with the “whole truth.” Witnesses can’t argue effectively very often, even though they very often try. Attorneys are flat prohibited from testifying. These differences in functions and responsibilities of attorneys and witnesses should drive different behaviors and attitudes for attorneys and witnesses.

There’s no such thing as a perfect case. **There are bad facts in every case.** Nowhere is this more true than in mock trial—the Mock Trial Committee happily writes the cases to be as even as possible, so that neither plaintiff/prosecution nor defense has the slightest advantage. An attempt to hide from, or minimize, a bad fact can result in it being highlighted. When a witness tries to deny, play down or side step a bad fact, the opposing attorney has a fine opportunity to

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<sup>3</sup> Many attorneys in real life, and many mock trial coaches, stress pausing before answering in order to give the direct examiner time to object to cross examination questions. Good point. But the more powerful reason to pause is to fully reflect before answering.

<sup>4</sup> In mock trial sometimes role playing requires some flexibility here, but the principle remains the same. In my view, in mock trial the plaintiff and defendant can generally be more emotional than other witnesses, lay witnesses need to present their testimony in such a way that they don’t appear so biased that they are not credible, and experts (and law officers and similar witnesses) need to maintain their objectivity and independence to an even greater degree than other witnesses. But each needs to give fair and direct answers to fair questions. See below.

emphasize both the point and the witness's lack of truthfulness by repeating the question or impeaching. Conversely, when a witness easily admits a bad fact, it increases the witness' credibility, and the ease of the admission may deemphasize the importance of the point. Face it, each witness in mock trial has admissions that must be given up—if the questions are phrased skillfully. The key is preparation: know *in advance* what you must give up, what you will clarify, and what you won't give up. In other words, know in advance what the fight is going to be about.

**A direct question—whether fair and balanced or not—deserves, even requires, a fair, direct and balanced answer.** Here's my guidance: listen to the question most carefully, answer it with the "whole truth" in as few words as possible, and STOP. Oddly enough, stopping seems to be the hardest part. The rarest answers, but sometimes the most powerful, are the shortest: "yes," and "no." Don't temporize over points that you are going to have to give up anyway. Don't argue. State the truth, particularly an admission to a "bad" fact, completely audibly in as few words as possible, and don't give the cross examiner the opportunity to repeat the question and hence stress both the point and the witness's unwillingness to admit to a "truth." As an aside, I note here that sooner or later in an examination you are probably going to be asked a question that requires an explanatory answer, and that's when the witness MUST have the jury's (the scoring panel's) full attention. Set up the long answers with short punchy answers to the preliminary questions. But most of all, be fair, direct and balanced.

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