

Rick Goldberg: The Art of Witness Preparation

by Rick Goldberg | Jun 7, 2016 | Witness Preparation | 0 comments



From Nine Tenths of the Law by Mitch Ackal

Rick recently had the opportunity to be interviewed by Mitch Ackal for his podcast on law, business and a little lagniappe, called Nine Tenths of the Law. Always excited to share some tips with the legal community, Rick joined Mitch on November 15th for the interview featured below.

I have a real, unique and specialized focus. I work with attorneys and I helped them win their cases.

That was Rick Goldberg. I am Mitch Ackal. And this is Nine Tenths of the Law.

When preparing a witness to testify, lawyers and litigation consultants must be careful not to cross the ethical line and overly coach or woodshed their witnesses. Not only is

woodshedding unethical, but it creates within the witness a fear and apprehension that hurts their credibility. In this episode, I speak with litigation consultant Rick Goldberg. Rick explains that the true art of witness preparation involves building up witnesses' confidence, credibility and conviction so that the truth can be effectively told.

Mitch: Rick, we both know lawyers have an obligation to effectively and zealously represent their clients. But we also know this obligation is tempered by certain ethical considerations and attention is certainly palpable when it comes to preparing witnesses to testify at trial, in depositions, before Congress, you name it, but when lawyer toy across the ethical line we use unflattering words such as woodshedding or witness coaching to describe such conduct. So that said, what is witness preparation? More importantly, what is it not? And where do we draw the ethical line between permissible and impermissible conduct.

Rick: Well that's a really good question and let me try to give you a real simple answer. Woodshedding and coaching might start with this phrase from a lawyer: "when you're asked a particular question the way you want to answer is like this... repeat after me." So when you get that "repeat after me" type of coaching, that's on the wrong side of the ethical line. That's more woodshedding and that's more word coaching. Witness preparation is different because witness preparation is "speak your truth." And what I do is I help people speak their truth in the most authentic credible way that they that they can, so that they come across as credible and genuine and believable to the fact finder, whether it's a jury, a panel or the judge.

Mitch: You identified and talked about five main stumbling blocks that often prevent witnesses from effectively incredibly speaking your truth; things that get in the way of credibility and believability, and you call them "The big five." They are fear, stress, anxiety, the need to be right and the refusal to acknowledge any shortcomings. First off, what's the difference between fear, stress and anxiety?

Rick: Fear is really one of the four primary emotions. There's fear, there's sadness, there's joy and there's anger. So fear is an emotion and it's the overwhelming fear, if you would, that something you have is going to be taken away from you. So often in litigation, the fear that clients have is they're going to lose. And when they lose, I don't really work criminal law, I working commercial and family law predominantly, so when you lose, there's an economic loss. So the fear is: "I'm going to have my net worth cut in half; I'm going to get hit for two or three million dollars; I've got huge legal fees that I don't know exactly how I am going to absorb." So that's the fear and there's the other side of that fear too, that: "I've already been damaged; I've already had something taken away from me; and how am I ever get to get it back; and how am I going to survive."

That's what fear is. Stress and anxiety really is a, I'll call it a habitual judgment in my opinion, that people automatically default to when they're in that place of fear. Because when you're happy, you don't typically go to stress and anxiety. But when you go to fear or when you go to maybe sadness and anger, all of a sudden you pull your pocket. "Well, when I feel that way, I'm going to flood it with stress; I'm going to flood it with anxiety" as opposed to just taking a view of: "Well let's take a look at this fear, you know, what's what can I learn from being in this fear right now? And how can I flip the switch from fear to determination? And how can I use that fear really as a way to show more conviction and really show more of who I am?" And people don't like to admit when they feel fear. One of the best things that witness can do on that witness stand is to get an early question from their client: "How do you feel?" and I'm hoping that they would be authentic and honest and they would say "I'm scared" "Well, why are you scared?" "Because this is the first time I've ever done this, and I'm just scared and I'm nervous." And that really, that's authentic and that's genuine, that's not them trying to hide behind anything, and a jury or judge are going to appreciate that because that's a real. I hope that's a good way to distinguish between those three.

Mitch: So fear seems to be the primary stumbling block and if fear can be conquered then there's a domino effect and stress and anxiety have a better chance of fallen by the wayside?

Rick: Yeah, and I would say don't even worry about conquering the fear. I would say lead with the fear. You know, samurai warriors what they used to do when they were going to battle, because they knew their life was really on the line every time they go into battle, samurai warrior would pull their sword out of the scabbard and they would envision their fear and they'd put it on the tip of their sword. So they would lead with their fear as opposed to keeping their fear buried, and what I might call in the shadows.

Mitch: Well before witness can lead with his or her fear, don't have to first recognize and admit it exists? And I know lawyers may have to walk a fine line so they don't offend their witnesses, but shouldn't lawyers have a role to play in helping witnesses recognize that fear may be getting in the way?

Rick: Correct. Attorneys, in order to really represent your client zealously like you talked about earlier, attorneys have to have a certain skill set. So when you sense that your client is in fear and if they're willing to acknowledge that with you; because often clients are intimidated by their attorneys and they want to look good for their attorneys, I mean they project a lot of stuff onto their attorneys, one of them is that you are you guys are often like father figures to them and they want to look good for you, no matter how old they are, and so they are often times unwilling to really go to those places and really

share with you about their anxieties and their insecurities. So I think it's up to the attorney to be able to empathize with the client and really listen, and just check out with that client from time to time: "Hey, how you feeling?" You know: "What's up?" "How are you and do you have some nervousness around this?" You can tell, but often times attorneys really just don't have the intuition to go there and say "Hey, let's take a break for a second. What's up? I noticed a body reaction in you that just triggered that you might really be upset around this topic. Let's talk about it." And so there needs to be a willingness to really get off the teaching and get off the preparation and get on with the "lets get the fear out of the body and let's work it out" so that we can open up space to put all this new learning and knowledge back in. So really it's just empathy and awareness because every situation is going to be different. I wish there was a magical blueprint of how to handle fear when we see it. Because it's all going to manifest so many different ways and just having been doing this for so long and, you know, as a psychologist, I just have really good intuition and I've been where they've been. I've had to sue someone before and I was sued, so I've sat in on hot seat and I get it, and it's not fun.

Mitch: Let's talk now about the second and third stumbling blocks that you've identified: stress and anxiety. What are some of the things witnesses can do to help alleviate stress and anxiety so that they can really maximize the strength of their testimony?

Rick: Other than reminding yourself that "you're right where you need to be" really the way to deal with stress and anxiety is away from the preparation process, it happens outside the door. So what I try and do you help them develop some kind of self-care and nurturing programs so that they can take care of themselves in physically, emotionally, mentally, and even spiritually, outside of the litigation and outside the lawsuit so that when they come in and they sit in that seat, whether it's in a preparation or in an actual testifying situation, they feel balanced and they feel lighter and because they been taking care of themselves. They've been meditating a little bit. They've been walking. They've been exercising. All those same things that are out there to relieve stress, we can we can identify those, the things that they can do in litigation, the same way that they do in just everyday life. So it's developing a self-care plan and holding them accountable, to stick with it. That's what I do.

Mitch: The last two, out of the big five problems you've identified, are one, the need to be right, and two, the refusal to acknowledge any shortcomings. How are these things stumbling blocks to being able to give credible testimony?

Rick: That's such a huge stumbling block and because that's our ego at work. I mean our ego wants to be right and typically, if you're involved in large litigation, then you're

working with successful people, and those successful people are there for a reason. It's because: they know how to motivate a team; they know how to make money; they know how to drive; they are relentless; they don't take no for an answer. All those qualities that make them super savvy and strong in the board room. They kill them in the courtroom. So what works in the board room doesn't work in the courtroom.

Mitch: So what are some tactics lawyers can employ to help witnesses make that transition from the board room and the "have to be right" mentality to the courtroom?

Rick: One of the things that I help them get really comfortable with is the fact that they don't have to be the smartest person in the room. That there are people that are way smarter than they are in that room. As an example, I have to teach them how to hear questions and that if the question just has a scintilla of weight to it that is in the legal arena like where they might be asked, not fact questions by questions related to the law, they have to understand that they don't have to answer that question and they don't need to know the answer the question. In fact, if they try and concoct an answer to that question, it is really probably going to be more hurtful than helpful to them. So I try and get them to understand that they can't be the smartest person in the room and that expressions like "I don't know" and "I don't understand," that those of their friends, that they're not their enemies. The ego wants to basically just "fake it, till it makes it" and concoct answers, like you do in a cocktail party. You get asked a question and if you just read a little bit about it somewhere, you become an expert, and not really, in that moment, well last thing you want to do in a piece litigation. And the clients really have to understand that, and we do lots of different, there's lots of different types of drilling and exercises that I do, because my whole approach is not, you know, a lecture. It's: we learn a little bit and then we drill and we practice, and we learn a little bit and then we drill and we practice. It is very; I like to tell them, it's very like Mister Miyagi and Karate Kid. You know, that at the end of the day they're going to master how to sit effectively in a testifying environment and be themselves and answer truthfully and honestly, but with such consciousness and awareness that they know what's going on at all times that no attorney is get to catch them off guard.

Mitch: Now I know you have come up with something called "detect and reject." What is that?

Rick: That's my flyswatter approach to arming yourself with the skills you need during a deposition or let's just say a hot seat setting. "Detect and reject" they're actually, the words were actually developed by an old colleague of mine and I just taken it and reinvented it a little bit, made it more of my own, but there's all kinds of questions that come at you from an attorney that you don't have to answer. And it's teaching clients to

be comfortable and confident with their ability to not answer the question. And what they have to do is detect what type of question it is, and then reject it. Rejection though, is not like in a negative forceful type of way like you might think of the Hakeem Olajuwon rejecting a layup. It's more of how to reject a question by being the nicest person in the room and really disarming the opposing counsel who is asking you the question. Because, as you know and as most lawyers know, in cross examination, you're not really interested in my story. You're interested in me confirming your story. And so your questions are to be designed to get buy-in to your story, not my story. So I have to eliminate my need to: number one, tell my story and number two, to answer affirmatively to questions that just don't have my truth in them. So if you're asking me to speculate, I have to be able to say: "I just can't answer that question." "Well, why not?" - which is a great response and lawyers will get it. "Well, sir, but because I just don't like to speculate." Or: "Was the tension so thick between you and your partner that you could cut it with a knife?" "I really can't answer that question." "Well, why not?" "Well, I would just never use those words -cut the tension with a knife." If attorneys put embedded assumptions into questions, I have to reject the assumption. If they're asking me to guess or they're asking me to theorize or hypothesize about something, I need to just reject it in a super, super nice, unthreatening way. But in a cocktail party, I would want to answer all of those questions. It would be, it would be my pleasure to try and do my best to answer those questions, but not here. If there's just one word in a question that I don't understand I need to know that I could say "I'm sorry, just don't understand your question." "What don't you understand about my question?" says the lawyer with gusto. "I just don't know how you're using the word, fill in the blank." If you don't remember, you just have to be able to say "I don't remember." That in essence is rejecting his question. So it's really, it's a nice little dance and it's something that clients just have to learn and the way they learn is just through practice and repetition, and my philosophy is that it doesn't matter what I'm teaching them to use these skills on because we learn the skills really without focusing on their lawsuit. So I get them away from the stress and away from the anxiety and away from the need to tell their story, those cripplers that we had talked about earlier, and we talk about other things. And my questions might be related to the story Goldilocks and the Three Bears or it might be related to The Three Little Pigs where I've developed questions that are just like the questions that they would get in litigation, but it's on a new case. It's on a fairytale type of a case. But it gives them the practice and the skills so that when we make the shift to practicing and getting to know their case and their themes and things like that, they already have the technique down. And so we're practicing more on that, but now we're figuring out how to express ourselves in the most concise, easily understood fashion possible.

Mitch: So oftentimes, an opposing lawyer will ask a witness during cross-examination,

what if anything he or she did to prepare for a deposition or for trial. And the opposing lawyer might even notice a consultant in the courtroom and suspect the consultant may have been involved in helping the witness to prepare to testify. Do you have any advice on how the witness and his attorney can minimize any negative inferences the cross examiner is trying to make out of the mere fact alone that the witness may have had some help minimizing some of the fears, anxieties and stresses?

Rick: That's a great question. When I do work with clients and then I do get them ready for something like this we do talk about it. And so I want them to be able to tell the truth also, it's like: "Did you prepare for your deposition?" "Of course I prepared." "Well, what did you do?" At that point, typically, the attorney will object and he'll instruct his client not to answer because it's privileged. But sometimes, I like to say, let him say that "I talk with my attorneys and may we went over basically some documents and the key thing is, they told me to basically be myself and just tell the truth." And that's sort of the foundation of what we're doing anyway. It is just teaching people how to be themselves and to tell the truth.

Rick Goldberg has a Master's degree in Counseling Psychology and is Board-Certified by the American Psychotherapy Association as a Professional Counselor. You can learn more about Rick and his litigation consulting firm by visiting www.RickMGoldberg.com

Join me next time on Nine Tenths of the Law when we explore some of the legal issues involving bourbon whiskey with Kentucky Bourbon Hall of Famer Chuck Kattery.