

## FOCUSING FOR CONFIDENCE

“A mind troubled by doubt cannot focus on the course to victory.”

—Arthur Golden, *Memoirs of a Geisha* (Knopf)

by

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One important key to success is self-confidence. An important key to self-confidence is preparation.

—Arthur Ashe

The mark of a truly civilized man is confidence in the strength and security derived from the inquiring mind.

—Felix Frankfurter, *Dennis v. United States*, 341 U.S. 494 (1951).

The trouble with ignorance is that it picks up confidence as it goes along.

—Arnold Glasow

You cannot depend on your eyes when your imagination is out of focus.

—Mark Twain

### **Focus**

Main Entry: 2 focus

Function: verb

Inflected Form(s): fo·cused also fo·cussed; fo·cus·ing also

fo·cus·sing

Date: 1775

transitive senses

1 a : to bring into focus b : to adjust the focus of (as the eye or a lens)

2 : to cause to be concentrated <focused their attention on the most urgent problems>

3 : to bring (as light rays) to a focus : CONCENTRATE

intransitive senses

1 : to come to a focus : CONVERGE

2 : to adjust one's eye or a camera to a particular range

3 : to concentrate attention or effort

- fo·cus·able / -k&-s&-b&l/ adjective - fo·cus·er noun

"... (T)he Red Queen said to Alice. "Always speak the truth --- think before you speak --- and write it down afterwards." Lewis Carroll, *Through The Looking-Glass*, The Millennium Fulcrum Edition 1.7 1994:59]

Focus groups are dramas that unfold in a modern existential theater, *The Theater of the Real*. The attorneys, their clients, and the witnesses find themselves enmeshed in a dispute played out through the jurors' perceptions of the facts, not by the facts themselves. Because of the importance of the perceptions, case preparation through focus groups seems to have become an essential part of modern litigation.

The Red Queen said to Alice. "You're thinking about something, my dear and that makes you forget to talk. I can't tell you just now what the moral of that is, but I shall remember it in a bit."

"Perhaps it doesn't have one," Alice ventured to remark."

"Tut, tut, child!" said the Duchess. "Everything's got a moral, if only you can find it." [Carroll, *Alice in Wonderland*, 1994:42]

Jurors decide cases based on what they hear and see. When the jurors observe the witnesses testify, they watch the witness and judge their credibility on a small sample of behavior, comparing it to their own perceptions and expectations. Jurors, just as focus group persons, base their understanding on the behavior and words used by the witnesses and the concepts and images used by the attorney. If these behaviors, words and images do not "map" onto a juror's perceptions, we reasonably should expect a juror to misunderstand the case.

"And here I wish I could tell you half the things Alice used to say, beginning with her favourite phrase 'Let's pretend.' She had had quite a long argument with her sister only the day before --all because Alice had begun with 'Let's pretend we're kings and queens;' and her sister, who liked being very exact, had argued that they couldn't, because there were only two of them, and Alice had been reduced at last to say, 'Well, YOU can be one of them then, and I'LL be all the rest.' And once she had really frightened her old nurse by shouting suddenly in her ear, 'Nurse! Do let's pretend that I'm a hungry hyaena, and you're a bone.'"

[Carroll, *Through The Looking-Glass*, 1994:3]

We should expect opposing counsel to present the case based on his or her ability to portray the actions and credibility of our case to the jurors in the worst possible light. And we can do exactly that in a focus group to evaluate the strength of their case.

Good case preparation presents an accurate and credible truth that avoids the sort of slippery words and careless generalizations that often encourage misunderstanding. Good case preparation begins before the deposition, with a thorough evaluation of the whole file and all the witnesses, continues through each deposition of each witness and culminates in specific focus group preparation for trial in given courtrooms.

The Percipient Witness:

Our first task is to help the percipient witness gain control of his or her words. Alice has exactly that problem with Humpty Dumpty.

"`When I use a word,' Humpty Dumpty said in rather a scornful tone, `it means just what I choose it to mean--neither more nor less.' `The question is,' said Alice, `whether you CAN make words mean so many different things.'

`The question is,' said Humpty Dumpty, `which is to be master— that's all.'

[Carroll, *Through The Looking-Glass*, 1994:38]

English is a highly metaphorical language which allows us to express similar ideas in various sorts of ways. Some words admit to few synonyms while others make half page entries in your thesaurus. This aspect of language can be used either to our advantage or disadvantage.

Specific jobs have a specific vocabulary. Some of this vocabulary is the same as Standard American English and the words mean the same thing. Other words are similar to Standard American English, but have specific, often legal, definitions. Many words have no common definition by the users of Standard American English and will not be understood when used. Finally, there is a category of words that have different meaning in different contexts and in different ethnic communities in the United States. In addition, adding to the confusion, abstract categories are subject to multiple interpretations, while concrete categories are personal categories, much less likely to be interpreted as differently as abstract categories.

Alice again experiences this in her conversation with Humpty Dumpty.

Alice was too much puzzled to say anything, so after a minute Humpty Dumpty began again. `They've a temper, some of them-- particularly verbs,

they're the proudest—adjectives you can do anything with, but not verbs—however, I can manage the whole lot of them! Impenetrability! That's what I say!

'Would you tell me, please,' said Alice 'what that means?'

'Now you talk like a reasonable child,' said Humpty Dumpty, looking very much pleased. 'I meant by "impenetrability" that we've had enough of that subject, and it would be just as well if you'd mention what you mean to do next, as I suppose you don't mean to stop here all the rest of your life.'

'That's a great deal to make one word mean,' Alice said in a thoughtful tone.

'When I make a word do a lot of work like that,' said Humpty Dumpty, 'I always pay it extra.'"

[Carroll, *Through The Looking-Glass*, 1994:38-39]

Witnesses take an oath to be truthful. Truth has two sides: That which is said and that which is perceived. The problem comes when the outsider's perception of their words is different from the witnesses' understanding of what was intended to be perceived. A witness who said, "I did not mean that!" is one who has just experienced that wide gap between what was said and what was heard.

Focus groups help define our task to help witnesses and their attorneys gain control of the rules of this game. Watching two attorneys doing battle in the Theater of the Real reminds one of the White Knight and the Red Knight. Having taken an oath to tell the truth, the witness wants to be in charge of testifying, but the lawyers run by their own rules, often seeming to pay more regard to each other than to the witness.

"You will observe the Rules of Battle, of course?" the White Knight remarked, putting on his helmet too.

"I always do," said the Red Knight, and they began banging away at each other with such fury that Alice got behind a tree to be out of the way of the blows.

"I wonder, now what the Rules of Battle are," she said to herself, as she watched the fight, timidly peeping out from her hiding-place. "One Rule seems to be, that if one Knight hits the other, he knocks him off his horse; and, if he misses, he tumbles off himself --- and another Rule seems to be that they hold their clubs with their arms, as if they were Punch and Judy --- What a noise they make when they tumble! Just like the whole set of fire-irons falling into the fender! And how quiet the horses are! They let them get on and off them just as if they were tables!"

Another Rule of Battle, that Alice had not noticed, seemed to be that they always fell on their heads; and the battle ended with them both falling off in this way, side by side. When they got up again, they shook hands, and then the Red Knight mounted and galloped off.

"It was a glorious victory, wasn't it?" said the White Knight, as he came up painting.

"I don't know," Alice said doubtfully. "I don't want to be anybody's prisoner. I want to be a Queen."

[Carroll, Through The Looking-Glass, 1994:38-39]

We want witnesses to be in charge of their testimony. Well prepared witnesses give truthful, accurate and precise testimony according to their understanding of the question. Well prepared witnesses take full responsibility for their own behavior. Well prepared witnesses only respond to specific and well formed questions from opposing counsel.

'You seem very clever at explaining words, Sir,' said Alice

'Would you kindly tell me the meaning of the poem called "Jabberwocky"?'

'Let's hear it,' said Humpty Dumpty. 'I can explain all the poems that were ever invented--and a good many that haven't been invented just yet.'

This sounded very hopeful, so Alice repeated the first verse:

"'Twas brillig, and the slithy toves  
Did gyre and gimble in the wabe;  
All mimsy were the borogoves,  
And the mome raths outgrabe."

'That's enough to begin with,' Humpty Dumpty interrupted: 'there are plenty of hard words there.'

We want transcripts that contain answers in the witnesses' own words. We should be able to electronically erase all questions from a deposition transcript and have a complete and understandable record to what the witness testified by reading the answers alone. How do we get what we want?

Alice discovered how the Queen was able to give good testimony:

"Living backwards!" Alice repeated in great astonishment. "I never heard of such a thing!" " --- but there's one great advantage in it, that one's memory works both ways."

"I'm sure mine only works one way," Alice remarked. "I can't remember things before they happen."

It's a poor sort of memory that only works backwards," the Queen remarked."

Instead of inventing testimony, the witness must master the concepts that underlie the testimony, learn the appropriate words, and fashion them into sentences. Inventing testimony often occurs if witnesses are told, "Just tell the truth as it occurs to you when you are asked the question." The witnesses are invited to rationalize how they think they should have behaved, or worse, how

they think their superiors, opposing counsel or jurors think they should have behaved.

This simple version of spontaneous truth suggests that the witness is blessed with photographic memory and childlike trust in the proposition that if you just tell your side of the story, the litigation will go away.

We get what we want because we break the problem of witness preparation into a series of sequential tasks and then into three methods of testing the results.

Tasks:

Task One: Issues

Task Two: Concepts

Task Three: Words

Task Four: Sentences

Task Five: Testimony

Task Six: Directed Practice

Task Seven: Evaluation

Task One: Issues

Research the community perceptions concerning the issues. The issues of the case must be defined before depositions are taken. These issues may be defined through the experience of the litigator, by the use of community surveys or with the assistance of dynamic groups to fine tune community response to the issues.

Test the trial facts by a community survey. A community survey of over 1000 persons done by telephone with an instrument that investigates the attitudes, language and demographics of the trial venue is the most rigorous and cost effective method of examining the perception of the trial facts. When this is done, the litigator has a rank order of the important concepts, a dictionary of the synonyms of the important words and a decision tree showing how to maximize the pro-defense and pro-plaintiff jurors.

Then test trial themes in real time with a dynamic group. After the community research establishes the range of attitudes, language and demographics, the case facts should be presented to dynamic groups of evaluation. This presentation enables the dynamic group to use their key words and cultural concepts as they attempt to understand the case facts. We see how a sample of potential jurors respond to those facts.

This dynamic group is not a mock jury. The group is not be thought of or treated as a jury. The differences are important: The dynamic group is asked at the first level what they perceive the facts of the case to be. Then they are asked to tell us how they evaluate those facts. During this part of the discussion,

typically there are differences among the participants as to how they value the case facts, so that the values are expressed in terms of other people's statements.

Example:

In one group, regarding an inflated claim, one person said "I've paid insurance for 20 years and never got anything back for it. Of course I would exaggerate a claim; I have one to get back what is owed me!"

From across the table, another person replied,

"What do you mean you got nothing! You had 20 years of protection and protection costs money."

The rest of the discussion centered around the concept of buying protection and settling claims, but it was not until the "buying protection" concept was put forth that the inflated claim was considered as inappropriate.

The result of this was to have the concept of "protection" as one of the areas of direct examination, so as to set the hook for our approach to the inflated claim.

A series of plaintiff and defense oriented themes are presented to the dynamic groups. The themes provide an explanation to the dynamic group for both the plaintiff's actions and our actions. The dynamic groups will tell us in their language, using their cultural concepts and word track, lots of different things that they believe to be important. This feedback allows the attorney to use the key words and cultural concepts of members of the dynamic group in the case presentation to the jurors.

After the research has been completed, structure the approach to the testimony. This requires a thorough interview of the witness and detailed examination of the documents used by the witness. This interview is translated to a story board that is organized chronologically or by case issues.

Task Two: Concepts

Concepts are the backbone of the testimony, connecting the head, the beginning, to the end, the tail. These concepts must be obvious to the witness and the attorney. These concepts can be ordered and memorized to guide the witness through the direct testimony.

Task Three: Words

"I only wanted to see what the garden was like, your Majesty ---"

"That's right," said the Queen, patting her on the head, which Alice didn't like at all: "though, when you say 'garden' --- I've seen gardens, compared with which this would be a wilderness."

Alice didn't dare to argue the point, but went on: "--- and I thought I'd try and find my way to the top of that hill ---"

"When you say 'hill'," the Queen interrupted, "I could show you hills, in comparison with which you'd call that a valley."

"No, I shouldn't," said Alice, surprised into contradicting her at last: "a hill can't be a valley, you know. That would be nonsense ---"

The Red Queen shook her head. "You may call it 'nonsense' if you like," she said, "but I've heard nonsense, compared with which that would be as sensible as a dictionary!"

Definitions of words are changed by context. Context is set by concepts and issues. Witness words should be chosen to truthfully represent the knowledge of the witness and be consistent with the words that are to be used in Motions for Summary Judgment, court testimony, and appeals resulting from the case.

Previous words that have been used by the same witness in similar situations should be identified by search of previous depositions and court testimony. If necessary, these words also should be correlated with the use of the word or synonyms in testimony of other company witnesses.

Task Four: Sentences

Here the Red Queen began again. "Can you answer useful questions!" she said. "How is bread made?"

"I know that!" Alice cried eagerly. "You take some flour ---"

"Where do you pick the flower?" the White Queen asked: "In a garden or in the hedges?"

"Well, it isn't picked at all," Alice explained: "it's ground --"

"How many acres of ground?" said the White Queen. "You mustn't leave out so many things."

"Fan her head!" the Red Queen anxiously interrupted. "She'll be feverish after so much thinking."

Avoid simple "yes," "no," and "I don't know" answers. Using "yes" and "no" in response to a question makes opposing counsel's question the witness's answer. If this is done, the opposing counsel gets to choose the words, the word track and the context. This sort of control should be exercised by the witness, not by opposing counsel.

Sentences have subjects and verbs and should be used. Depositions are easily understood when they have complete sentences with well defined subjects and concrete verbs. References like "he," "she," "it," "they," "that" and "those" confuse testimony and should be eliminated from sentences.

Alice was too much puzzled to say anything; so after a minute Humpty Dumpty began again. "They've a temper, some of them --- particularly verbs: they're the proudest --- adjectives you can do anything with, but not verbs --- however, I can manage the whole lot of them! Impenetrability! That's what I say!"



Using sentences does not mean that the witness volunteers information. The information of the sentences is limited to the concepts used in the witness preparation sessions.

#### Task Five: Testimony

"I can't believe that!" said Alice.

"Can't you?" the Queen said in a pitying tone. "Try again: draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said: "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen. "When I was your age, I always did it for half-an-hour a day. Why, sometimes I've believed as many as six impossible things before breakfast."

Deposition testimony is not a conversation. Each question and answer should stand alone. Deposition testimony has rules as formalized as sonnets or Haiku. These rules are to present clear, concise and competent testimony.

The percipient corporate witness is to answer only clear questions to which the witness has direct percipient knowledge. Avoid all questions, when appropriate that require an opinion. Do not speculate. Use contextual and limiting statements in answer. Know the appropriate series of connected answers and allow following questions to connect the answers.

In direct examination, the witness must be able to lead him or herself through examination. In cross examination . . . the witness must be able to respond to leading questions through examination.

The witness must control the specific information necessary to answer questions, including job description, file review, and command of legal responsibilities, if any, that govern the conduct of the witness.

The witness must be able to know the importance of truth and distinguish true statements from false statements, percipient statements from opinions and speculation.

The witness has responsibility to exercise his or her personal power so that the witness is in charge of his or her own behavior. The witness knows his or her own actions. The witness knows his or her own duties. The witness limits knowledge of others' actions. The witness limits knowledge of others' duties.

In addition, the witness must have personal understanding of the deposition process, the trial process, the trial process and the role of our attorney as well as the role of the opposing attorney.

Dominance, submission and social control are at the heart of human behavior. Humans are a species that share the primate characteristic of hierarchical social control. This means that humans naturally and normally look to leaders, often for guidance and occasionally for control. Leaders lead and followers follow. In our social system, lawyers are leaders and witnesses, unless

they are prepared, tend to become followers. Humans attend to the signal of others and masking emotions to help control the continuation of social conversations. In addition, we take turns, by using verbal, tonal and linguistic cues that tell the other person that it is time for him or her to take their turn in a conversation. Experienced counsel use these linguistic tricks to enable the witness to talk when he or she should be listening. This "turn taking" is at the heart of good direct and cross examination, and most witnesses are inadequately trained to keep silent when they have completed a question and counsel does not respond.

"Speak when you're spoken to!" the Queen sharply interrupted her.

"But if everybody obeyed that rule," said Alice, who was always ready for a little argument, "and if you only spoke when your spoken to, and the other person always waited for you to begin, you see nobody would ever say anything . . ."

A well trained witness does not fall for that common trap. In order to work within a culture that requires masking of emotion, either to provide privacy to the individual or, perhaps, mislead others, there are various cultural rules that most members of a given culture learn. In our American middle class, rules include: "poker-face," that is a frozen face that will not admit any emotional gesture; smile face, a habitual smile that sometimes is called a cocktail smile, playing across the face to hide unpleasant reactions or stronger emotions.

Choosing not to communicate non-verbally is much easier to do than trying to give false emotions. A well prepared witness must be trained to do this.

Paul Ekman, following Charles Darwin a century later, showed that the identification of facial gestures of emotion is genetically coded and universally recognized. This means that the jurors in a case, if they are sitting close enough to the witness, will be able to identify and react to the emotions of the witnesses.

Patterns of non-verbal behavior are critical because about 80% of social communication is non-verbal. The expressions on the face reflect emotions, while gestures reflect a person's mood. A person's dominance or submission is revealed by posture and stance. If we control the non-verbal signals, we go a long way to gaining control of the environment of the deposition. Controlling the environment allows the witness to control his or her testimony. The witness must be taught to control this environment.

The room can be set up to maximum advantage or disadvantage of the witness. This room is typical: a long table with the witness on one side and the opposing attorney on the other side. Witness's counsel sits next to the witness and a court reporter sits at the end of the table. This arrangement positions the opposing attorney in the direct gaze of the witness, a position of maximum advantage to the witness.

The witness must be prepared to take charge of this environment and with the help of the attorney, can do so.

Initial social interaction often includes a social greeting by name with ritual touching, the hand shake. Social chit chat is offered by the opposing counsel in the fashion of a host or hostess to a new guest in the home, suggesting that the witness is a guest and should act like one. Legal mood altering drugs are generally offered including caffeine in coffee and tea and white sugar in donuts and rolls. If the witness is a caffeine user, it is likely that the person has been adequately caffeinated before the deposition and the offered liquid will hypercaffeinate the person, increasing the likelihood that the person will be agitated and want sugar to cut the edge off the agitation.

Again, good witness preparation turns this against opposing counsel, so the witness does not act out the role of guest, allowing the opposing counsel to be the person giving favors. Decaffeinated coffee helps.

Deposition social interaction is informed by the assumption that the opposing attorney is in control, in control of the place, the witness and the rules. If this assumption is not challenged, the opposing counsel will control the whole deposition.

A well prepared witness takes control and sets the rules as a natural part of the oath to tell the truth.

#### Task Six: Directed practice

Directed practice is absolutely necessary for the preparation of the witness. Directed practice by witnesses includes the use of a story board outline of testimony, appropriate differentiation between percipient and expert levels of truth, and appropriate levels of non-verbal behavior in the deposition or trial. This practice must include both direct and cross examination and be evaluated to insure the witness that his or her performance has met the standards of the attorney and client.

When the witness is prepared, the test of the witness can be done. This is best done before trial by live testimony in front of a dynamic group.

Fourth, the key testimony of significant witnesses is presented in real time to the dynamic groups.

This allows the witnesses to have presentation experience with immediate feedback to their performance. Each witness must have the ability to control his or her performance, and this dynamic group feedback is an excellent way to fine tune testimony.

#### Task Seven: Witness Evaluation

An evaluation of the witness is done regarding the following areas:

1. Experience of the witness:
  - A. Depositions: Read and analyze depositions.
  - B. Trial: Read and analyze trial transcripts.
2. Job experience of the witness:
  - A. Knows previous job descriptions?

- B. Knows that there is a time limit on job knowledge?
- C. Knows present job description?
- 3. Case evaluation:
  - A. What is the role of the witness in the case?
  - B. What is the role of the witness in the company?
- 4. Witness Evaluation:
  - A. Ability to memorize outline?
  - B. Ability to reject influence of opposing attorney?
  - C. Ability of witness to handle opening admonitions?
  - D. Ability of witness to analyze questions?
  - E. Can witness differentiate truth and untruth?
    - 1. Can witness define truth?
    - 2. Can witness define speculation?
    - 3. Can witness define lies?
  - F. Ability of witness to field questions?
  - G. Personal punitive potential of witness:
    - 1. Does the witness have a punitive personality?
    - 2. Is the witness an "opposing attorney pleaser"?
    - 3. Is the witness a rigid, rule follower?
    - 4. Is the witness hostile and combative?

Alice, as usual provides the last word:

"It's too late to correct it," said the Red Queen: "when you've once said a thing, that fixes it, and you must take the consequences."