Do You Solemnly Swear?

A CPA's Primer on Delivering Truthful and Powerful Testimony

By Todd E. Betanzos and Christina L. Betanzos

Inherent in any CPA's work is the likelihood that he/she will need to answer questions about his/her work, whether those questions come from clients, management, the government or other tax professionals. The professional communications involved in the daily practice of accountancy most likely become commonplace and second nature to CPAs within a few years. However, even the most experienced CPAs may not know what to expect when the questions posed to them are part of an experienced attorney's deposition or trial examination.

Like many other individuals, CPAs possess tremendous technical and professional expertise, but often lack the skill or experience necessary to manage an attorney's examination and communicate their truth in a manner that is clear and incapable of mischaracterization. This article is intended to provide CPAs with a primer on the unique communication rules applicable to legal proceedings in which they are called to testify, the rights and responsibilities of a witness under oath, and the skills that will help them to make truthful, accurate and powerful testimony.[1]

Understanding the Real Ground Rules of a Deposition

First and foremost, it is crucial for anyone anticipating that they may have to sit for a deposition to understand some of the essential ground rules governing the proceeding. This is essential, because examining attorneys often neglect to reveal *all* of the dynamics and rules that should guide the witness as they endeavor to offer truthful and accurate testimony.

At the beginning of most depositions, the attorney conducting the examination will typically ask a litany of questions intended to establish a set of ground rules for the deposition. These questions commonly include things such as:

- Do you understand that the oath you have taken is the same as would be given to you by a judge in a court of law?
- And you understand that the penalty for perjury is the same in this deposition as it would be at a trial or hearing?

- If you don't understand one of my questions, will you agree to tell me so that I can rephrase it?
- And if you don't tell me that you don't understand my question, is it fair to conclude after this deposition that you did in fact understand my question?

While the attorney might ask these questions in a nonthreatening, perhaps friendly tone, make no mistake: they are intended to establish not only a set of understandings between the attorney and witness, but a sense of control over the proceeding. The attorney absolutely intends for the witness to feel as though it is the attorney who will direct the examination and exercise control over the deposition. This is the paradigm most favorable to the attorney, and these questions (admonishments, even) often reinforce preconceptions held by many witnesses. Specifically, witnesses frequently report that they feel powerless to control anything about the examination and that they simply need to "do their best to answer the questions" asked of them by the attorney.

It can be dangerous for a witness to operate under such assumptions and subject to the control exercised by the examining attorney, because – despite what one might expect when imagining the civil litigation process in an idealistic manner – many attorneys conducting depositions are not, in fact, engaged in a search for truth. Not entirely, anyway. To understand how this could possibly be, one must first consider the roles of the individuals involved in the taking of a deposition.

The examining attorney has a client whom he/she represents. The deposition is conducted within the context of a lawsuit – a dispute between parties in which one (or both) of the parties has alleged that the other has committed some wrong for which monetary damages or some sort of injunctive relief are sought. In most cases, the attorney was not present at the time the dispute arose and may not have had any involvement in or connection to the underlying relationship or transaction at issue. In other words, the attorney's understanding of the facts that underlie the case are based upon the client's description of the dispute, the damages they have suffered, and the relief they wish to obtain. Of course, the attorney probably has access to contracts, emails, correspondence and other materials that may also shed light on the dispute.

Ultimately, however, the attorney is tasked with identifying all potential remedies available to the client and pursuing those through any legal means. Because the attorney's duty is to zealously represent their client and, in so doing, to develop evidence that proves the facts most favorable to his/her client, the attorney sets out in a deposition to do just that – to develop sworn testimony that supports the client's claims or defenses.

Cynical as it may seem, this doesn't necessarily mean that the attorney endeavors to obtain pure, objectively "truthful" testimony. If a witness is mistaken about a material fact, and that mistake happens to lend support to the client's case, one should not expect the attorney to interrupt the witness and generously correct his/her error. To the contrary, in that situation a clever attorney is likely to recognize the witness's error and ask additional questions intended to lock the witness into that testimony so that the witness will find correcting themselves at a later date to be difficult or impossible. Likewise, there will be many matters – events, conversations, jobs, tasks, etc. – that are subject to more than one version or interpretation.

Given this reality, witnesses should expect an examining attorney to advance a version of those disputed facts most favorable to his/her client. If a witness is not sufficiently prepared to identify those characterizations and reject them as inaccurate or incomplete, the attorney's version of the facts may ultimately be established as undisputed.

It is equally important that anyone who anticipates having to sit for a deposition understand the significant limitations placed upon the other attorneys present for the examination, including any attorney actually representing the witness himself/herself. In many jurisdictions today, including both the state and federal courts of Texas, an attorney participating in a deposition may only object to questions by making a very brief statement of objection on the record. For example, the Texas Rules of Civil Procedure, which govern all procedural aspects of civil litigation in Texas state courts, read as follows.

199.5 Examination, Objection and Conduct During Oral Depositions

(e) Objections. Objections to questions during the oral deposition are limited to "Objection, leading" and "Objection, form." ... Argumentative or suggestive objections or explanations waive objection and may be grounds for terminating the oral deposition or assessing costs or other sanctions. ...

(f) Instructions not to answer. An attorney may instruct a witness not to answer a question during an oral deposition only if necessary to preserve a privilege, comply with a court order or these rules, protect a witness from an abusive question or one for which any answer would be misleading, or secure a ruling . . . The attorney instructing the witness not to answer must give a concise, non-argumentative, non-suggestive explanation of the grounds for the instruction if requested by the party who asked the question.[2]

It is true that witnesses may speak with their attorneys during breaks in the deposition, but there is a split of authority among courts across the country as to the extent to which witnesses and their attorneys may discuss substantive matters relating to the examination without waiving the attorney-client privilege. Consequently, there is a wide range of attitudes among practicing attorneys as to how much guidance

continued on next page

they are comfortable providing to witnesses during the pendency of a deposition.

Seeing these dynamics – the examining attorney on the offensive and the defending attorney restrained by rules of procedure – more clearly, witnesses can better understand that they are, in many ways, on their own throughout the deposition.

The Role of the Witness

Having set forth some of the more fundamental ground rules for a deposition and the roles of the attorneys therein, the witness should understand precisely what truly is his/her role during the deposition. While the attorney conducting the examination would like the witness to believe that his/her sole role is to answer whatever questions might be asked, that is not entirely accurate. A review of the witness oath provides a solid foundation for a more accurate understanding of the witness's responsibility.

The oath calls for the witness to swear or affirm that their testimony will be the truth, whole truth and nothing but the truth. There are three basic elements of all testimony, captured by this oath:

- The Truth: These are the facts to which the witness can speak with personal knowledge;
- The Whole Truth: Additional information that gives the facts greater meaning; and
- Nothing But The Truth: Anything the witness knows is not true.

To satisfy their oath completely, the witnesses must do three things throughout their testimony:

- Report and describe the facts precisely (i.e., tell the truth);
- Give those facts the necessary context and background in order to be understood fully and fairly (i.e., tell the whole truth); and
- Protect against inaccuracy and mischaracterization of the facts (i.e., tell nothing but the truth).

The witness is the only person sitting in the deposition who is charged with that duty. And, because attorneys quite often ask leading questions that in and of themselves are tantamount to testimony, it is the witness who must serve as a gatekeeper.[3] Witnesses must protect the record of the proceeding to ensure as best they can that *everything* said during the deposition is truthful and accurate in every respect.

This duty to ensure truth and accuracy in the deposition record is strikingly similar to the ethical obligations of CPAs both here in Texas and throughout the United States. The Texas State Board of Public Accountancy's Rules of Professional Conduct mandate is to "establish and maintain high standards of competence and integrity in the practice of public accountancy."[4] The Rules of Professional Conduct set forth the responsibility owed by a CPA licensed in Texas to his/her clients, the public and the board/profession. Directly relevant to providing sworn testimony, the rules define a "discreditable act" to include:

(13) intentionally misrepresenting facts or making a misleading or deceitful statement to a client, the board, board staff or any person acting on behalf of the board; [and]

(14) giving intentional false sworn testimony or perjury in court or in connection with discovery in a court proceeding or in any communication to the board or any other federal or state regulatory or licensing body [5] ...

Furthermore, all licensed Texas CPAs who are members of AICPA are subject to that organization's Code of Professional Conduct. AICPA's Code provides guidance on the ethical and professional responsibilities of a CPA and begins with broad statements of principle that obligate AICPA members to "[assume] an obligation of self-discipline above and beyond the requirements of laws and regulations" and to maintain an "unswerving commitment to honorable behavior, even at the sacrifice of personal advantage."[6] The principles set forth a comprehensive ethical framework for a CPA focusing on independence, objectivity and integrity. The Code's Integrity Principle explicitly states that "[t]o maintain and broaden public confidence, members should perform all professional responsibilities with the highest sense of integrity ... Integrity requires a member to be, among other things, honest and candid within the constraints of client confidentiality."[7] Consistent with the oath taken by witnesses in legal proceedings, the common theme throughout the AICPA Code is one of honesty.

Powerful Deposition Testimony Begins with Listening

If the witness is truly to embrace the role of gatekeeper during the deposition, and fulfill his/her ethical obligations as a CPA to the best of his/her abilities, he/she must understand that being a witness in a deposition is a listening exercise first and a speaking exercise thereafter. This runs counter to many people's sense for what a witness does ("I'm supposed to answer questions, so that means I'll be doing a lot of talking"), but it makes more sense when one thinks about the rudimentary mechanics of a deposition.

A deposition is essentially a legal interview (with, as noted earlier, a healthy dose of leading or suggestive questions included throughout the dialogue). To be an effective witness, one must understand that they have to perform three key functions involved with listening and responding to a question in the following order: listen, think, speak.

While this may strike some readers as elementary to the point of being insulting, they would be surprised at how many witnesses allow themselves to begin responding to questions without taking the time necessary to *listen* to the entire question and *think* about both what they want to say and *how* they want to say it. The reality is that failing to process carefully and purposefully each question posed to them during a deposition examination – speaking before listening or thinking – literally allows one's mouth to get ahead of their brain. And that rarely, if ever, yields a desired result.

When a witness is truly committed to listening carefully to each question, and to thinking about how to respond, he/she requires a tremendous amount of concentration. This means discipline and patience. It means understanding that a witness can only answer one question at a time. And it means realizing that a witness should not attempt to beat the attorney to where the witness believes the attorney is going with his/her line of questioning. A truly disciplined witness – one in command of his/her testimony and of the record as a whole – understands that he/she must take his/her time, breathe, listen, analyze and then decide the appropriate response to the question at hand.

Witnesses Have Rights

While there are certainly plenty of attorneys practicing in civil litigation today who are happy to work with witnesses to ensure that they understand a question before feeling obligated to answer it, the adversarial nature of litigation generally, and depositions specifically, lends itself to

attorneys wanting to exercise as much control over the proceeding and the witness as possible. Unfortunately for witnesses, this doesn't always translate into a deposition examination geared toward making things particularly easy for witnesses.

For that reason, witnesses should keep in mind that their job is not to answer every question posed to them by an attorney – no matter how confusing, misleading or otherwise defective the question might be. The witness is not obligated to overlook the flaws in a question simply because an attorney asked it during a deposition. To the contrary, witnesses are entitled to questions that enable them to fulfill their oath. We call these "answerable questions."

An "answerable" question is one that a witness *can* answer truthfully and accurately without any necessary clarification, correction or other modification. Of course, many lawyers may be tempted to challenge a witness by suggesting that it should not be difficult to answer a question truthfully, but the manner and conditions under which attorneys ask questions of witnesses often make it difficult or impossible to do so. (Attorneys don't always like to acknowledge this fact.) To be answerable, each question must meet certain requirements: (1) it must be understandable; (2) it must be free of errors and (3) it must be free of distractions.

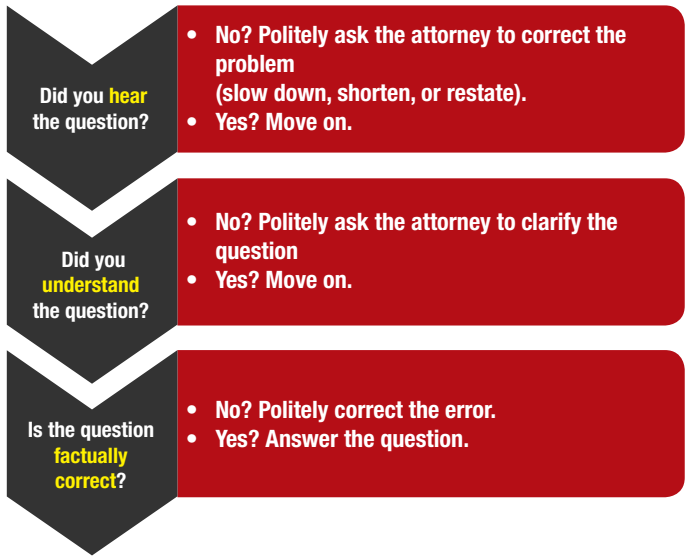
A question is understandable to a witness when it is asked in such a way as to allow the witness to hear it completely and determine precisely what is being asked of him/her. This means that the question (or series of questions) should not be asked too quickly for the witness to "keep up" with the attorney; it should not be so long or multifaceted as to be impossible to analyze, and it should not be unclear or confusing to the witness in any way. If the question poses any of these challenges to the witness, he/she must request that the attorney remedy the problem before answering. If the witness fails to insist on a question that is understandable, he/she cannot possibly ensure that the answer provided will be truthful and accurate. Witnesses should never attempt to answer the "gist" of a question. They must be precise in their understanding and in their delivery of testimony.

Likewise, a witness should never ignore factual errors that are embedded in an attorney's question. This might seem simple, but attorneys frequently ask questions that contain a faulty premise of some kind. If the witness focuses on the question posed, but fails to correct the factual error, inaccuracy or mischaracterization, he/she essentially adopts and endorses the veracity of the attorney's statement. For this reason, witnesses must be prepared to identify such errors and insist that they be corrected before answering.

Finally, the importance of being free from distraction cannot be overemphasized. Too often, witnesses do not give a question their undivided attention. Without realizing it, they are distracted in some way. They are thinking about their previous answer. They glance at a document shown to them earlier and think about it momentarily. They need to stand up and stretch, but are trying to be brave and wait for one of the attorneys to suggest a recess. Whatever the distraction may be, no matter how minor, it breaks the witness's concentration. And if witnesses did not hear the precise question asked of them, they cannot possibly know whether they are answering it correctly.

To think about how to "audit" the questions asked of them during a deposition, witnesses sometimes find the checklist in Figure 1 to be helpful. It becomes possible for a witness to undertake this kind of an auditing process with an attorney's questions when they approach the deposition with patience and discipline, and when he/she realizes that he/she must listen first, then think and finally speak.

Figure 1: Auditing Deposition Questions.



Toward that end, it should be noted that auditing an attorney's questions and insisting that they be asked in such a way as to be "answerable" should not be misinterpreted as an invitation to be rude to – or play games with – an attorney. To the contrary, a witness should always strive to be the most courteous person in any deposition. One's insistence on answerable questions should be expressed politely and with the genuine aim of ensuring that the deposition record be as truthful and accurate as possible.

Preparation is Key

Making testimony is no different than any other acquired skill. It requires preparation, through learning skills like those discussed herein and some amount of practice. It is not sufficient simply to "know what you know" or to be generally familiar with the key facts and documents in a case. In fact, if a witness hasn't thought about precisely how he/she will address the key events, communications, actions, documents, etc., it is more likely than not that he/she will have a very difficult time finding the right words when required to do so under oath.

Witnesses often find themselves at a loss for the right words when the moment requires it. They misspeak. They agree to characterizations offered by an attorney, because they come close to capturing the truth. Or, they come across as less than in command of the facts in the case and their (or their employer's) fundamental position on the issues.

For these reasons, witnesses should ensure that their attorneys take the time necessary to prepare them thoroughly for the deposition. The witness and his/her attorney should dedicate ample time to deconstruct the witness's role in the case, as well as the issues and facts the examining attorney is expected to cover during the deposition examination and to think carefully about both what the witness wants to say about those matters and how he/she wants to say it.

continued on next page

One thing must be clear about this process, however: it is absolutely not about "spin." The preparation process should provide the witness with the tools he/she needs to communicate his/her truth as clearly and accurately as possible. It should be borne out of each witness' genuine, personal sense of what is true, regardless of whether it is identical to the testimony of other witnesses in the case. (In fact, the witness will be far more successful if he/she is able to distinguish thoughtfully between his/her own perspective on disputed facts and issues, and that of other witnesses.) The goal of thorough preparation is to maximize the witness's credibility by helping them to develop a clear and honest telling of his/her truth.

Communications experts teach that repeated telling of a story creates increased efficiency. Over time and repeated telling, the speaker will find more appropriate words and phrases, as well as clearer and more concise explanations. Making testimony is no different. The preparation process should involve digging beneath the surface of the witness's initial retelling of the pertinent events or details and challenging themselves to think about their experience from a number of different perspectives. Once the witness begins to find language that feels comfortable and captures his/her truth accurately, he/she should be asked to do it repeatedly in the form of mock question and answer sessions that simulate as closely as possible the anticipated deposition examination.

The key to the mock question and answer process is repetition, because the act of hearing questions, identifying problems with them, and retrieving specific words and phrases to answer certain questions is a neurolinguistic skill. This listening and speaking with precision is muscle memory. It is no different than a golf swing or a swimming stroke or a free throw. Initially, it will feel clumsy to the witness, but once learned, it can be refined and ultimately mastered.

Likewise, the examination any witness faces in his/her preparation should be at least as difficult as the questions they will be forced to answer during the actual deposition. The goal here is for witnesses to leave the deposition feeling not as though they were prepared for each and every question asked of them throughout their deposition, but rather as though there was nothing more challenging than they were asked to contend with during their preparation.

Every witness must understand that he/she should insist that his/her attorney take the time necessary to ensure he/she is properly prepared to testify. Too often, preparation meetings take place either the day of, or perhaps the afternoon before, a deposition and last just a few hours. This simply is not sufficient to ensure that witnesses are comfortable and prepared for their testimony. Depending upon the complexity of the issues to be covered, the number of documents the witness is likely to be asked about during the examination, and the contentiousness of the dispute, proper preparation will require a full day to several days of work. The witness must be his/her own advocate when discussing the preparation plans with counsel. Only they will be required to fulfill the oath administered to them once the deposition has begun.

Empowering the CPA as a Witness

We hope that sitting for a deposition or testifying at trial is a rarity for CPAs – unless, of course, they choose service as an expert witness as a professional pursuit. Regardless of the circumstances giving rise to such obligations, however, CPAs should take comfort in the understanding that with patience, discipline and proper preparation, they can manage the examination process to ensure that the record of the proceeding is clear and their testimony is truthful and accurate.

The concepts addressed in this article represent somewhat of a paradigm shift from what some who have testified previously may have thought or experienced. In truth, these lessons are about witness empowerment, because we believe the most accurate testimony is delivered by witnesses who embrace their role as gatekeepers and guardians of truth. ■

Footnotes

1. While this article may prove interesting or helpful to CPAs whose practice involves frequent testimony in an expert or consulting capacity, it is aimed primarily at those for whom offering testimony in a deposition or at trial is more of a departure from their typical professional activities.
2. TEX. R. CIV. P. 199.5 (Sept. 2016). The Federal Rules of Civil Procedure, which govern conduct during depositions in federal civil proceedings, set forth substantially similar restrictions on attorneys. *See* FED. R. CIV. P. 30(c)(2) (Dec. 2016).
3. Examples of leading questions that are, for practical purposes, testimony on the part of the attorney, include "Isn't it true that today is Friday?" and "You would agree, wouldn't you, that the sky is partly cloudy today?" In asking questions like this, the attorney is offering testimony about facts and asking the witness to endorse their truthfulness and accuracy.
4. 22 TEX. ADMIN. CODE § 501.51(a) (Aug. 2016).
5. *Id.* at § 501.90.
6. AICPA Code of Professional Conduct, Preface: 0.300.010 (Preamble) and 0.300.020 (Responsibilities) (December 15, 2014). Retrieved February 28, 2017 from: http://www.aicpa.org/Research/Standards/CodeofConduct/DownloadableDocuments/2014December15ContentAsof2014June23CodeofConduct.pdf.
7. *Id.* at 0.300.040.01 and 0.300.040.03.

Todd Betanzos is a trial consultant and mediator. Formerly a partner with a national law firm, he has become a highly sought-after expert in assisting companies with the preparation of key witnesses for testimony and the development of juror-focused trial strategies and tactics. Betanzos's work also involves the overall development of dispute resolution plans built upon carefully tailored focus group and mock trial studies. He earned his B.A. from The University of Arizona and his J.D. from The Dedman School of Law at Southern Methodist University.

Christina Betanzos is a senior lecturer in the Jindal School of Management at the University of Texas at Dallas. She teaches Business Law, Business and Public Law, and Accounting Communications. Betanzos earned her B.A. from The University of Texas at Austin, her MBA from The Owen School of Management at Vanderbilt University and her J.D. from The Dedman School of Law at Southern Methodist University.