

## 4 Stages Of Witness Preparation You've Likely Never Heard Of

By **Jeff Dougherty**

You have an important witness to prepare for deposition or trial testimony. The person is smart, well-spoken and personable.

You give her great advice on how to deal with adversarial or cross-examination questions, you prepare her for the trouble spots of her testimony, and you help her understand how important it is to have good body language, voice tone and facial expressions. You spend a good deal of time with her, and at the end of your preparation session she says she understands, and she seems ready.



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Then you try some practice cross-examination-like questions with her and she becomes defensive, doesn't answer the questions you ask, argues, and becomes frustrated (as do you).

This probably has happened, and likely more than once. If I'm right, read on.

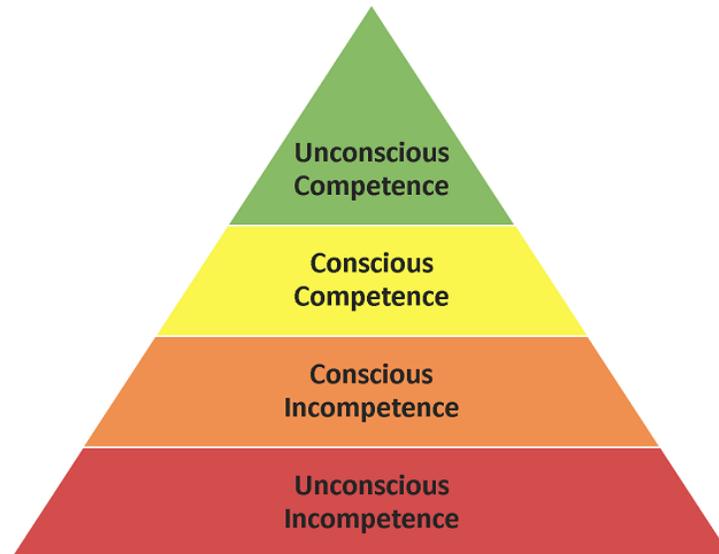
Testifying is like no other communication environment. So, even if your witness is a great communicator in her professional life, the skills that may make her a good communicator professionally likely do not translate to what is necessary to communicate effectively under oath.

What this truth means is that your witness needs to learn a new skill. She needs to learn how to become competent at telling the truth within the context of an adversarial setting, one that contains a variety of formal and unfamiliar rules and is like no other communication environment she's ever experienced.

Anytime a person attempts to acquire a new skill or to become competent at any activity, they follow a predictable pattern known as the four stages of competence.<sup>[1][2][3]</sup> People who are called upon to testify under oath are no different — testifying requires acquiring a new skill set.

For example, witnesses need to learn how to think about questions in a new way; they need to learn how to answer questions in a way that's palatable to a jury; they need to learn how to identify problems with opposing counsel's questions, and know what to do about it; they need to learn how to remain confident under the scrutiny of cross-examination; and the list goes on. These skills are not innate, they're acquired.

If your witness is struggling to become competent at testifying, then it's likely she's stuck somewhere in the red, orange or yellow sections of the stages of competence pyramid below.



### **Stage 1: Unconscious Incompetence**

Someone at the base of the competence pyramid does not know how to do something and, unfortunately, is also not aware of their lack of knowledge. Simply put, the person does not recognize she lacks the right skills to do something well. Most witnesses start here because they have no understanding of the legal process, the rules of evidence, nor what it's like to be deposed or cross-examined. They often think, "If all I have to do is tell the truth, then it shouldn't be so difficult."

Interestingly, witnesses of higher-than-normal intelligence, or those who are socially sophisticated, seem to struggle most in getting out of this stage as compared to other witnesses. For these witnesses, failure to advance beyond stage 1 is due to their belief they'll be able to rely on their wits to get them through their testimony. This reliance on wits has likely worked for them in every other aspect of their lives, but it won't work in the legal setting.

Examples of signs a witness might be in stage 1:

- Failure to return phone calls;
- Reluctance to set or keep appointments;
- Reluctance or refusal to schedule sufficient time for preparation sessions;
- Inattention during meetings or preparation sessions (constant texting, checking phone messages, taking phone calls);
- Overconfidence;
- Arrogance;
- Frequent interruptions during preparation sessions;
- Advising counsel how to try the case;
- Taking an overactive role in strategizing.

### ***How to Help a Witness out of Stage 1***

Typically, witnesses get stuck at stage 1 because they don't understand the things that

attorneys take for granted, and to them, the legal world is an enigma. For example, they usually don't know what a deposition is or its purpose. They don't understand the risks to their own case if they perform poorly in a deposition or on the witness stand. Further still, they don't even know what testifying effectively looks like. Therefore, education is one of the most important ways to help someone out of this stage.

Because every witness is different, every witness will require a different educational approach to help them out of stage 1. For some it will require a soft touch, which includes understanding, empathy, support and patience. Other witnesses require a firmer touch, which means they will only be open to education after their overconfidence has been broken. It's extremely important to identify correctly the reason a witness is stuck at stage 1, otherwise you run the risk of implementing the wrong solution, which will make matters worse.

## **Stage 2: Conscious Incompetence**

The person operating in the orange section of the pyramid recognizes she doesn't know how to do something, and she understands that acquiring a new skill will help her overcome her deficits. During this phase (after a good deal of education), witnesses practice testifying — and they learn by making mistakes.

For example, during practice Q&A sessions, they learn what will happen to them if they try to argue with opposing counsel, guess at something they don't actually know, offer unsolicited explanations, or fail to pay strict attention to the question being asked. Witnesses in this stage start to understand the gravity of what they face and acknowledge that they need help.

Examples of signs a witness is in stage 2:

- More humility;
- Only self-identifies some mistakes when practicing testifying;
- Needs frequent technique reminders during practice sessions (e.g., be patient, only answer the question asked, maintain neutral body positioning, don't justify answers, don't argue);
- Curiosity;
- Lack of confidence (which will grow in time);
- More questions, less advice;
- Increased anxiety (a good thing that will reduce as they climb the pyramid);
- Increased effort;
- Willingness to meet as long as is required;
- Frustration (a good thing because it shows they care and want to do better).

## ***How to Help a Witness out of Stage 2***

Witnesses in stage 2 are in the process of learning a new skill; consequently, they will make mistakes, some of which will be frustrating to both counsel because they seem obvious and the witness because they're not yet obvious. During this stage, it's unwise to start practicing with the most difficult questions posed in the trickiest way possible. Rather, start with softball (but adversarial) questions, and as the witness becomes accustomed to the questioning style, move gradually to the more difficult questions.

A common mistake attorneys make during this stage is to only point out the mistakes made

during practice sessions. Doing so can decrease the witness's self-confidence, making them feel like they'll never get it. Thus, it's important for attorneys to recognize and praise the progress the witness has made, even if it's small.

Additionally, attorneys should be cautious about pairing positive feedback with negative feedback, e.g., you did X well, but you did Y and Z poorly. In the witness's mind, once you say "but," you negate everything you said before "but."

### **Stage 3: Conscious Competence**

Nearing the top of the pyramid, the person in yellow has acquired some competence at a skill, but the demonstration of that skill still requires a lot of thought and concentration in performing it well. This person might still be thinking in steps, performing the skill mechanically, or executing the skill without fluidity. Once a witness reaches this phase, she is on the pathway to becoming a competent witness; however, there's more work to do.

If witness preparation stops here, the witness runs the risk of looking uncomfortable, hesitant, guarded and confused in the deposition or on the witness stand. During this phase, witnesses' answers might look canned or rehearsed, which is something that can only be overcome with more practice.

Examples of signs a witness is in stage 3:

- Reduced anxiety;
- Increased confidence, recognizing there's more work to do;
- Improved attitude;
- Errors in practice Q&A but makes self-corrections;
- Somewhat mechanical;
- Guarded;
- Optimistic;
- Improved mood;
- More relaxed.

### ***How to Help a Witness out of Stage 3***

Moving through the stages of the pyramid takes time, and sometimes witnesses don't reach stage 3 until the end of the day. When this happens, it's tempting to stop witness preparation and call it good. However, stopping in stage 3 is the key reason attorneys utter the sentence, "I don't know what happened, I thought she was going to do well; she seemed ready."

That's because, she was only almost ready, but she hadn't mastered the skill yet — she needed more practice. There's a balance to consider though, because pushing a tired or mentally fatigued witness to keep practicing can do more harm than good. Care must be taken to stop when it's time to stop and resume the next day or sometime in the near future.

### **Stage 4: Unconscious Competence**

At the pinnacle of the pyramid, the person has had enough practice with the skill that she performs it naturally and fluidly. At this level, it is almost as though the skill has become second nature — which is where witnesses need to be before they're actually sworn in to

testify. When witnesses reach this phase, their answers look natural, they deliver their testimony with confidence, their demeanor is relaxed and professional, and they come across as genuine. They are able to stay calm under pressure, and they can easily identify and avoid opposing counsel's traps.

Examples of signs a witness has entered stage 4:

- Answers questions fluidly without second guessing the answer;
- Demonstrates confidence with every answer;
- Looks relaxed;
- Uses natural language;
- Has a pleasant demeanor;
- Self-corrects rare mistakes calmly.

Stage 4 is where witnesses need to be before they provide actual testimony. You and the witness will both know when she's reached this level. She will look and act like a different person than she did when she first started. In rare circumstances, she will even look forward to testifying.

So, the next time one of your witnesses is having a tough time during witness preparation, think about the four stages of competence. It'll be likely that your witness is stuck in one of the bottom stages on the pyramid. Once you identify where she's stuck, your ability to get her moving and improving will be enhanced, making your preparation session all the more efficient.

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[1] Broadwell, Martin M. (20 February 1969). "Teaching for learning (XVI)". [wordsofitlyspoken.org](http://wordsofitlyspoken.org). The Gospel Guardian. Retrieved 11 May 2018.

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