

## **Admonition In's and Out's**

We were taking a break during percipient depositions at the Long Beach City attorney's office when I had the chance to ask the seasoned court reporter something I'd been pondering for quite some time.

"Do you know," I asked her, "why we give admonitions at the beginning of depositions?" She furrowed her brow and thought for a second before answering.

"It's to help keep the proceeding orderly," she said.

"Nothing more," I pressed.

"Well," she replied, "That's what I think. There isn't anything in the Code." Her eyes rotated up and around, like they do when people are searching their memory. But the conversation was pretty much over.

The truth is, we all know about admonitions and we all use them more often than not to start a deposition.

I learned mine from Gary Paul and Tony Stuart back in the old days at the Paul & Stuart law firm. I always assumed that Gary and Tony, in turn, learned their spiel from the lawyers at the old Greene, O'Reilly firm. My rap goes something like this.

Q: Have you ever testified at a deposition before?

A: No.

Q: Okay. Then before we start, let me give you the standard admonition that we give lay witnesses before they testify. The first thing you need to know is that the oath that you took from the court reporter before we went on the record is the same oath that you would take if you were testifying before a judge and jury at the time of trial. And the meaning of the oath is that you agree to testify truthfully today, to the best of your ability, under penalty of perjury. Do you understand?

A: Yes.

Q: Alright. At the end of today's session the court reporter will take her [or his] notes and reduce them into a booklet and you will have the opportunity to review that transcript and make any changes you feel are appropriate. I have to caution you that if you make material changes to the transcript, like a "yes" to a "no" or "green" to "red," then the attorneys in this case will be free to comment upon that at the time of trial and that would hurt your credibility as a witness or even be embarrassing to you. So I ask that you listen carefully to the question and try to provide your best testimony. Fair enough?

A: Okay.

Q. Good deal. Now, as a matter of courtesy to the court reporter, I ask that you please wait until I'm through asking my question before you respond and I'll do my best to wait until you're through answering before I ask my next question . The reason we do it that way is the court reporter can only listen to one of us speaking at any given time and we want to get the best picture of your testimony that we can today. Okay?

A: Yes.

Q: Fine. Now it's also important while you testify today that you answer my questions with verbal responses, meaning words and sentences. "Uh-huh," "Uh-uh," bodily gestures, grunts and groans, that sort of thing, don't translate into a good written record and again we want to get the best picture of your testimony that we can. Understood?

A: I understand.

Q: Fantastic. During the course of the deposition you can provide me with estimates but I ask that you don't speculate or guess. Do you understand the difference between the concepts?"

A: Yes.

Q. Are you under the influence of any medication that might affect your ability to recall?

A: No.

Q: Great, let's get started.

Now, just because I have a standard admonition, doesn't mean I use it all the time. Over the years, I've learned that whether or not I use an admonition, and just how I use it, will depend on the situation.

I learned from an excessively cranky defense lawyer that if you prefer, you don't need to use admonitions at all. "I've never used them and it's never made any difference," the old hack, er, hand, told me when I complained that he hadn't instructed a witness. I was still a young lawyer, but that got me thinking. I looked around and, sure enough, I couldn't find any legal requirement that the interrogating lawyer instruct the witness about how to testify. It was, how can I put it, a liberating revelation. It also put me on a path towards what I'd call creative witness admonishing.

Sometimes, I dispense with the admonition all together. Usually it's either because I'm in a hurry to get the witness answering questions or I sense an aggressive approach will yield more fruit than a laid back, orderly manner. On the other hand, sometimes I just forget to instruct. I get focused, intense and forgetful sometimes. Just ask my wife if you don't believe me.

I've had defense counsel complain to me about not admonishing from time to time.

Usually, I don't bother explaining my legal analysis re admonishments. Instead, I just sort of respond like this:

Q: [Directed to the witness] You know you're supposed to tell the truth, right?

A: Yes.

Q: Okay, that's the important part. We can deal with the rest later if we need to

. . .

The defense lawyer usually looks unhappy, which never bothers me and I can start questioning the witness without any undue delay.

Sometimes, dispensing with admonitions with a well-coached witness helps unbalance the carefully prepared testifier, which means there's a heightened chance of obtaining testimony that more closely resembles the truth. Other times it's just the opposite. I want to give a long, easy admonition, because it helps the witness settle down and become comfortable with the process before I start tackling the more interesting stuff.

At the end of the day, it's the *art* in lawyering that is the most enjoyable part of being trial counsel. Giving yourself some flexibility in how you admonish witnesses can give you a psychological edge in that mental battlefield that is the deposition.

Oh, but don't forget to keep things orderly so the court reporter won't slap you upside the head.

Go get'em.

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**ARTICLE:** [Picking Experts and Avoiding Nightmares](#). Choose your experts wisely.

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