

Giving Evidence

The following advice is based on over 40 years of being hammered as honest witness in court and from the new book (April 2013) Bribery and Corruption by Comer and Stephens.

Most advice on being a witness is written by lawyers: very few of whom have actually given evidence. It is therefore akin to a voyeur advising on tantric sex. **Doing it is totally different from watching it.**



"I know you have claimed the Fifth Amendment, Captain Blackbeard, but what the parrot and monkeys say can be used against you. What's more, it will be much worse for you if they remain silent"

CHAPTER **37** *Negotiating Settlements and Going to Court*



That's Nearly All Folks

Negotiating is an art form and not a legal or investigatory skill. Persuading regulators is little different from dealing with the Taliban or the mother-in-law on a bad beard day and companies should not delegate responsibility for what are essential financial negotiations¹ to a lawyer no matter how clever he or she is. Negotiation is a specialist skill and a very high level and independent professional should be seconded to a small team supported by a senior manager and a litigation specialist. Just to repeat: it is absolutely not recommended that negotiations be left to internal or external lawyers or, even worse, to any investigator.

Giving away too much detail here on strategies and tactics that have been successful in negotiating with regulators would be injudicious so: THAT'S ALL FOLKS! Except to say that plans should be made for appearing in court, which is a daunting prospect.

Attending Court and Giving Evidence

BACKGROUND

The day may come when you are called into court or before a tribunal to give evidence either as a witness or a defendant. Although this is a terrifying prospect, your ordeal can be made easier if you heed the following warnings. These are written in a very personal way simply because, when you most need them, everything will be extremely personal. The advice is written primarily for members of the male sex, because women are far too smart to get entangled with Courts unless they are solicitors, barristers or judges; in which case they can more than look after themselves and need no encouragement.

Giving evidence is a good example of the saying: 'what goes round comes round' and you just have to accept the reality when it is your turn in the barrel. If you have done your job professionally and honestly, the experience in court will be nauseating but tolerable. If you have been unprofessional, dishonest or unfair, this is the time when your backside is going to get severely tattooed and it serves you right. We trust you will not be in this position, but if you have any 'little problems' it is essential that you tell your legal advisers what they are before the case starts. This is the time to be really honest. But remember if you admit to your lawyers that you are guilty, they cannot normally argue

¹ Negotiations on settlements and DPAs is – at the end of the day – mainly horse trading.

your innocence. They can leverage mitigating factors and technical mistakes, or even claim that you are mad or terminally ill but they still cannot say you are innocent when you have admitted you are guilty.

PREPARING THE CASE AND STATEMENTS

You should take the greatest possible care when drafting your statement, affidavit, proof of evidence, quantification or other schedules and should not get carried away with literary licence, enthusiasm or emotion in the heat of the moment. The words may look good and powerful when you write them, but when they are read out in court it is entirely a different matter and it is worse still when you are cross-examined. Remember that you may have to justify every single word and syllable – under hostile cross examination – so be factual and certain. If you have any doubts, tell your legal advisers and DO IT NOW! If you are a defendant you do not have to give evidence on your own behalf, but juries are not stupid and if you claim the Fifth Amendment they will usually assume the Sixth, which is that you are as guilty as hell and wet unable to take the heat.

CHECK YOUR PAPERS

Always prepare for court carefully; know your statement, proof of evidence or affidavit, backwards forwards and inside out and the exhibits to which they refer. Understand every scribbled note, every entry and deletion on every exhibit and have a TRUTHFUL answer for it. Double check all schedules, calculations and the conclusions you have drawn and on which you might be required to comment during your evidence. If you believe that a source of information should be protected,² or if you have some other problem, tell your lawyers. You must also make sure that you tell your lawyers about every piece of evidence, intelligence or rumour, so that he or she can decide what has to be disclosed to the opposing side. If you do not make a full and proper disclosure, you could lose your case on this point alone.

Also, although you may discuss your evidence with your colleagues, to refresh your memory and avoid mistakes, you must not improperly influence them and not try to get them to say things they do not remember or do not know to be true. Similarly, you must not be improperly influenced by other witnesses, your partner, boss, lover, psychiatrist or even one of your mistresses. Just tell the truth and your chances of survival jump off the scale. Lie and you are in deep trouble.

Double check your notes and other records that you may be allowed to refer to in the witness box to refresh your memory; make sure you can read and understand them. Try to remember when you wrote them and do not lie that they were contemporaneous when they were written that morning on your way to court. Check with your lawyers precisely what papers you are allowed to take into the witness box but never take anything that is not needed or slightly dodgy, like *Playboy*, *Sadism Now!*, the *Racing Post* or the latest *Women's* Institute magazine.

Anticipate that your notes and other papers will be taken from you while you are in the witness box and scrutinised by opposing Counsel and possibly by a forensic document examiner acting on his behalf. This makes it imperative that they do not

² Such as your mistress or lover.

contain embarrassing things such as details of your Swiss bank accounts, or notes of your insider trading. Never back date documents or claim they were prepared earlier or later than they were: different inks or typefaces glow like Rudolph's nose and document examiners can date things precisely. Do not say you have never seen a document when you have, because fingerprinting will prove your lie. Look very carefully at the documents you may have to hand over for impressions made on them from other documents. ESDA examinations can retrieve the slightest indentations on documents written five or six sheets above those being questioned. Now if that is not worrying enough, worry a bit more, because forensic examiners can pick up DNA from just about any surface including those from a single touch or a transfer from one surface to another.

GET IT IN YOUR DIARY

Make sure you have multiple reminders – in your diary, Filofax, PDA or iPad and on the back of the fridge door – of the date and time you are required to attend court. If you forget to appear and instead scamper off to the lap dancing club with your local MP, or go to have your nails polished you will be in very serious trouble and may be punished for contempt of court. **AND DO NOT BE LATE!!!**

THINK ABOUT THE QUESTIONS

Think, if you were the opposing party, how YOU and your evidence might be attacked. Consider the questions you might be asked and discuss them with your colleagues and, if he or she is willing, with your lawyer, but never with your wife or mother in law, because they will go like Exocet missiles to the weak points which will unsettle you. If there are holes in your evidence, or if you have made mistakes, be prepared to admit them and apologise, if necessary. It is much better to make an open and remorseful admission than to have the truth painfully dragged out of you in cross examination. You may get your backside kicked but that is nothing compared to a perjury or contempt of court charge and once you start to fib or prevaricate you are at the top of a very slippery slope.

CHECK OUT THE COURT

Familiarise yourself with the court, how to get there and how long the journey takes even when you have to stop every ten minutes for anxious lavatorial breaks. If you have not given evidence before, sit in on another case³ for a couple of hours before your big day. Watch and get the hang of things. It is pretty awesome; lawyers are very clever and courts are nasty places, to be avoided at all costs: if you can and you can't.

³ You cannot attend one in which you might be called as a witness and if you are a defendant you will not be able to avoid every painful moment.

ON THE DAY

Appearance

On the day you are required to give evidence or appear as a defendant, arrive at court really early and make sure you dress sensibly. Your wife or partner may tell you that you look amazing in your yellow waistcoat, pink braces, Gucci sunglasses and Hush Puppies, but it is doubtful that the court will appreciate their sartorial elegance. Wear loose clothing and comfortable shoes, just in case you have to make a dash for it. Also wear clothing that – unlike Tony Blair’s – does not show excessive sweating and whatever you do, do not go to the Taj Mahal for a vindaloo the night before, get plastered or engage in tantric sex. Like fierce hunting dogs, lawyers smell fear and seeing signs of your terror or exhaustion will just make matters worse.

If you wear dentures, a glass eye or a hair piece, make sure they are firmly affixed. It will not help your credibility if in the heat of the moment an appendage becomes detached and the judge and jury (but, obviously, not the barristers) have to rummage around the floor of the court trying to find it.

If you are a member of the Surbiton Train Spotters’ Club, or the Cheam Lady Gardeners’ Magic Circle – no matter how proud you might be of such a rare distinction - do not wear the lapel badge, tie or cap. This is not impressive. All you will achieve is to mark yourself out as plonker and thus damage your credibility before you even open your mouth. If you must have facial hair, make sure you do not look like a member of the Taliban and if you have a pencil thin moustache, please shave it off. Only ballroom dancing instructors or car salesmen have these. Same if you have one of those silly beards that you have to sculpt every morning with the precision of a brain surgeon.

If you have tattoos try and cover them up. Obviously this is a bit tricky for the graphic of your gerbil which you had burned into your forehead on a boozy night out in Slough or a ring through your nose or tongue. But on arms, legs, boobs, and bums concealment of an idiotic past is strongly recommended. Finally, look at your shoes. Really astute observers⁴ pay close attention to a man’s shoes and if yours are woven crocodile and ostrich scrotum with pink tassels and high heels, everyone will know you are dodgy. Women’s’ shoes don’t count in the same way, but ladies should think carefully about wearing twelve inch high Jimmy Choo stilettos for two reasons. The first is that they can set stuck in the pavement: making them late or unable to move in court. But more importantly, if a witness appears a lot taller than the lawyers they will immediately resent you, especially if they are vertically challenged as many are.

Waiting To Be Called

You can guarantee you will be kept waiting outside the court, possibly for hours if not days. Do not worry about this because it is all part of the softening up process. Do not read sensitive papers in public areas and be careful with your mobile telephone, Blackberry, iPad or laptop. Do not engage strangers in casual conversation because the delightful blond – who says her name is Flossie Flowfinger – sitting next to you in the waiting room,

⁴ Who have attended the authors’ seminars.

who tells you she finds fat, old, grey haired men an aphrodisiac, could be a plant for the opposing side to get you into a compromising position. Believe it or not, this sometimes happens and what you tell her may be used against you when you are later impaled in the witness box. There is a similar rule for lady witnesses; the guy chatting you up in the waiting room is more likely to be a spy for the opposition than George Clooney⁵ even if he does have a cup of Nespresso coffee in his hand.

So take care: do not discuss your evidence or the case, generally, with anyone else waiting around the court and especially with a witness who has not completed giving evidence and not been released. A little paranoia does no harm and waiting about makes matters worse. This is the time to have a nap, read this book or *The Guardian*.

While you are waiting you will see barristers, solicitors, and even ordinary homo sapiens and Neanderthals walking around, clutching papers and looking either very happy or very anxious, but note that they all walk very quickly, using short jerky steps giving the impression that their legs are stuck together at the knees. And they all have scruffy shoes.

Although lawyers are very clever, some do have human inclinations, but do not be misled by their emblems – such as wigs, gowns, or a battered face. Wigs are a historical relic meant to increase your anxiety, as is the layout of the court. If you do not believe how important venue and emblems are in increasing anxiety, you are about to find out. Courts are nasty places, full of testosterone and very aggressive men and women. They are best avoided: but you can't.

Entering the Court with Élan

You will have to wait outside the court – for hours if not days - until your name is called. When this happens your legs will buckle and your past flash before your eyes, so much so that you will wish you had heeded your mother's advice and, like your uncle Alf, become a butcher or followed your Auntie Nora into a convent: but it's too late.

Make sure you pick up all of your belongings – TURN OFF YOUR MOBILE TELEPHONE – and walk into court nice and slowly; do not panic but look around and – if your head will accept the command – upwards. Take your time and grab some deep breaths. Wait to be spoken to and do not start off with a cheery 'Good morning, judge. I like your wig' or with some flippant remark to the opposing party like 'Guilty bastard'. Neither will go down well.

Also if you are a Freemason, do not be tempted to give any secret gesticulation to members of the jury, the judge or anyone else. This will not be appreciated, especially if you outrank them. Stand still and wait until you are spoken to and take a few deep breaths, without overtly panting or gasping.

Giving Your Evidence in Chief

You will be asked to give your name and take an Oath or to make some other form of incantation, depending on your beliefs. But this is not the time to get into a philosophical

⁵ So ladies, please wear your glasses.

debate about religion and it is best to accept the book given to you, even if it is a Rastafarian creed. Repeat the Oath very carefully and remember that first impressions count and that within seconds the judge, jury and counsel will have unconsciously categorised your emblems and formed an opinion of you. If you get off to a bad start, or anyone senses any weakness, your backside will get kicked even harder and more often: that's a promise. Never forget that animals only attack when they believe the prey is weaker than they are. You are now in the jungle and you are about to be marinated ready for lunch.

There is not much you can do about your name, but it does have an effect on the way you are perceived, especially by the jury, which is made up of ordinary folk – too gullible or too honest to avoid their noble duty. If your name is Peregrine Anstruther Tarquin Jocelyn Maltravers-Blythe, you might want to abbreviate it a bit. You may have noticed that in days gone by people with double barrelled names were all from the upper classes. Today commoners, and even football players, have them so maybe you want to say your name is Perry Blythe and leave the gory detail to the imagination

On the other hand if your name is Richard Head, you should avoid abbreviating your first name, even though your wife says she likes it a lot. If, 60 years ago, you served in the Catering Corps of the armed forces and reached a commissioned rank, do not say you are Major Jones or Field Brigadier Nonkins. Neither is the court interested that you were once a Boy Scout or even a Brownie.

Do not lie about your qualifications or experience. If you are an estate agent, try to find an alternative title such as property consultant or real estate specialist; juries like such words because they remind them of the National Health Service and that nice Mr Jones, the specialist consultant at Balham Hospital, who operated on their ingrowing toenail. Consultant is a great word, except to those who have to pay their fees.

Similarly do not append your academic qualifications to the end of your name, such as Dick Head, BA, MA PhD and five GCE O levels, including Scripture. Unquestionably, you and your mum are proud of your achievements, but most people won't give a hoot and will regard your claims to academic excellence as irrelevant trade puffing. This is especially so if they can't read or write as is the case with more than a few jurors.

In court, you must appear ordinary

In normal circumstances you should be led through your evidence by counsel representing your side, but do not be thrown if, as soon as you enter the witness box and have got your breath back, his opposite number jumps up and makes an objection. This is usually because his case is hopeless and his only chance is to argue some esoteric legal point to have your evidence excluded.

In criminal cases, the judge may ask the jury to leave while such fine legal objection is being considered. Do not worry and just stand there, look around the court, and answer any questions you are asked. This is the time for you to watch the lawyers closely and you will discover that many are more nervous than you. In fact the only person who is really cool is the judge.

If all goes well and under normal circumstances, you will then be asked questions by counsel representing your side. This is called your evidence in chief. Your counsel should be friendly, or superficially so, and he may even smile from time to time, nod his head and give you positive non-verbal feedback. Do not relax, because if things go wrong, he will drop you like a hot potato.

Remember, lawyers are very clever and you are only in their world because they get paid for beating you to a pulp. Even if they are friendly towards you and in the breaks call you by your first name, do not expect an invitation to join them for a night of fun at the Pink Pussycat Lap Dancing Club. Within minutes of the case ending they will not even recognise you, let alone speak to you. If a scapegoat has to be found, lawyers close ranks and will turn on you or some other poor mortal. It does not matter who the scapegoat is, how old, or how innocent; his only qualification is that he must not be a fellow barrister.

Direct all of your answers to the judge and try and establish eye contact with him and members of the jury from time to time, but do not glare or wink or look shifty. Keep your answers simple and truthful. Most honest witnesses genuinely want to assist the court and thus volunteer things they believe could be helpful. Do not do this or try to be clever and on no account make any comment that could remotely make any of the lawyers look foolish, because they are all excessively vengeful and never wrong. Just answer the questions you have been asked, preferably with a binary yes, sir, no, sir or no judge. If the judge is a lady (which is normally very good news) it is best to address her as 'judge' or 'Ma'am' and definitely not as 'Missus' or 'Luv'. Remember, lawyers do not necessarily want to hear the truth but they do expect their questions answered and to be shown unlimited respect.⁶

If – at any point – you are not certain of a fact, ask the judge if you can refresh your memory from your papers. Under no circumstances should you guess or try and crack a joke. Humour, especially, will backfire on you, although you must always laugh at the judge's jokes. Before you get into court you might want to rehearse laughing at stuff that is not funny as well as bursting into tears and practicing how to faint and fall to the floor gracefully, without hurting yourself.

Counsel for the other side may continue to jump up and down and make objections to your evidence. This is a good sign, unless he has a gerbil in his underpants or in his or her knickers in which case it means nothing. In the very unlikely event that opposing counsel has a spontaneous attack of humour, you may laugh, but it is much better to look puzzled or, better still, burst into tears. This should throw him off course. If it all comes on top, you might want to feint a heart attack or fit.

It is definitely to your advantage if you are a little deaf and can legitimately claim that you have not heard a question. Having a question repeated three or four times will give you time to think. But do not claim poor hearing only when nasty questions are being asked: this is a dead give-away. If you are going to feign being deaf, at least be consistent.

When you have finished your evidence in chief, wait in the witness box and whatever you do, do not look smug because the ambush is just around the corner. Never forget that lawyers are clever and the older they are the more clever they become.

Cross-examination

The big problem comes with cross-examination by the prosecution (if you are a defendant) or by opposing counsel, otherwise. If there are a lot of defendants, each one will have his own barrister, who will attack you and all will try to out-do his colleagues in terms of nastiness. If the opposing barrister appears to be female, take even more care. It is one of life's great truths that opposing lawyers always appear bigger, better, cleverer and more

⁶ But they won't show you any!

determined than yours, but do not worry. Revert to the neuro-linguistic picture of them without their clothes on.

Opposing counsel will ask you lots of dreadful questions, try to trip you up, catch you out and make you appear an incompetent idiot or much worse. Remember this is his job and he will be doing his best, but it's no worse than being grilled by your wife or mother-in-law when you forgot to buy the tomatoes you were asked to get from Asda. Just remain calm and do not take it personally and remember when you get home your dog will still love you. Tell the truth and if you have made a mistake admit it and, if necessary, apologise. Lawyers are not used to apologies and your candor will impress them if only for the microseconds before they kick your backside.

Do not argue the case or matters of law – you are not an advocate – appear impartial and concede points genuinely in favour of the opposing party whom, deep down, you know is a loathsome lowlife who pulls the legs off spiders and picks his nose. Just stick to the facts, remain emotionally detached and never look at the opponent because, if you do, he will have a face like thunder and this could unsettle you.

Occasionally, counsel will make mistakes and if this happens do not laugh because if you do he will get you later. Lawyers are very clever and have long memories. As ordinary folk we are in the firing line and if any human wants an easy life he should become a lawyer or politician or, if clever enough, a judge: now that is a really good job. True the judges' pay is not great but the perks, like unrestricted ability to kick ass and having your jokes laughed at all the time more than compensate.

Finally, remember that courts are the lawyers' hunting ground and that witnesses are their next meal. Lawyers always win, whatever the outcome. But every dog has its day and that's why this book has been just a little bit rude to them.

Witnesses are to lawyers what plankton is to whales

Re-examination

When the opposing barrister eventually sits down, you may be re-examined by counsel for your side. You can tell how badly you have been damaged in the cross-examination by the number of questions he asks and the way he avoids eye contact. If there are lots of questions, you can assume you have not been impressive. Do not worry: that's life, and lawyers are very clever.

Finally, you may be asked questions by the judge. These are the most important. Take care as judges are cleverer than anyone else and they have unlimited power to kick ass. Simply tell the truth.

Breaks in the Case

You can almost guarantee that you will not complete your evidence in one session and will have to worry through a lunch, overnight or during some other adjournment. George Carman, QC – perhaps the leading advocate and cross-examiner of his generation – used to love this, if not contrive it. He used to say it will give the witness time to worry and he was right.

Do not speak to anyone during breaks in your evidence. Politely ignore and avoid eye contact with members of the jury and the defendant if you happen to bump into them in the pub, bingo hall, lapdancing club or Lodge. Just pretend you haven't seen them and get out of their space as quickly as you can. If you ask them questions or make any comment to them about the case, you could be in real trouble for contempt of court: so say nothing.

During longer breaks – however tempting it might appear – do not console yourself by a prolonged session in the pub. Keep off the juice overnight and arrive at court the next day nice, fresh and preferably celibate: imagine you are a Premier League footballer the night before a big match.⁷ Tell your spouse you have a migraine and get a good night's sleep; if that's at all possible. Think about your evidence, the drift of the opposition's case and the questions you might be asked the following day. If you have made mistakes, tell your legal advisers and be prepared to admit them in the witness box.

Leaving the Witness Box

Do not attempt to leave the witness box until the judge says you can and before moving off, make sure you can still ambulate your legs. The Judge may or may not thank you, depending on how well you have performed. Pick up your stuff, look confident and walk slowly away, taking care not to fall over or faint. If it is possible, sit down at the back of the court and wait until the next adjournment.

Most witnesses rush from court immediately after completing their evidence and this is a big, big mistake because in kingdom Animalia – which is where you are – this is interpreted as a desertion of territory and a cowardly flight response. So hang around for a while and look cool. If you were a dog this is when you would pee against the jury box to claim your territorial rights: but avoid doing this because it could give a bad impression.

The Opponent's Evidence

At some stage evidence will be called for the other side, including witnesses, experts, other defendants and even the malodorous villain may be shameless enough to take the stand. Last time you saw him he was 6 foot nine tall, with muscles like Popeye, a dark Benidorm tan, a pencil thin moustache, and oozing with jewellery and fancy feet. In court he will present himself as a fragile old gentleman, possibly terminally ill, in whose mouth butter would never melt, so do not be taken by surprise. This is justice at work.

If you have the time, sit in court while opposing evidence is being given, but do not glare at the witnesses even though they may be telling dreadful lies and poking holes in your brilliant evidence. From time to time you can shake your head in disagreement, put your hand over your mouth, or affect a sickly smirk, but do not overdo the acting and do not let the judge catch you doing it. Just sit back and wait, because your counsel will be able to cross examine the opponents and this is where the fun *should* start although it is usually the case that the opposing barrister seems much more effective than yours, who never asks the right questions and is far too wishy-washy. But that's life and he is

⁷ Not a good example!

probably being much more effective than you realise. Anyway, that's what he will tell his wife when he returns home to Battersea.

If you discover that any of the witnesses are telling lies, try to get a message to your counsel, but do not bob up and down like a kangaroo. Chances are, in any case, counsel will ignore you. Lawyers, like waiters in posh restaurants, are trained to be deaf and blind when it suits their purpose.

The Summing Up

Eventually, at the close of the case and submissions, the judge will sum up the evidence and this will reveal just how clever he really is. You may have thought he was an buffer who was asleep for most of the time, but now you will discover he has a mind as sharp as a razor and the recall of an elephant. Keep your eye on the jury during the summing up but again do not nod, wink or make Masonic signs. Just watch, try and look really confident and nod when the judge makes a point in your favour and he may make some.

It always seems to be the case, whichever side you support, that the judge's summing up is against you. Do not worry because it is much like watching the England football team where the detail is far worse than the result.

The Deliberations

When the judge has finished, he will send the members of the jury out to consider the evidence and the court will adjourn to wait for the result. This is a bad time for everyone, so just relax. Many jurors who have boring lives will see their noble calling as a chance to stay overnight in a fancy hotel, all expenses paid, while they deliberate. This is especially likely if one or more of the jurists has tantric desires involving one or more of his or her colleagues because it is a great excuse for a serious amount of rogering, at the state's expense. Do not worry about this: it is life and with any luck one-day you might serve on a jury and your turn will come.

After what will appear a lifetime's wait, the court will reconvene and the jury will shuffle in. It's strange, but jury members always look sheepish and have their heads down, especially after a boozy night's deliberating in a luxury hotel. When the verdict is announced, grip your seat really hard and do not leap in the air and shout, but just accept the verdict and remember you are a participant in British justice at its very best and it will make you proud that you pay our taxes.

If subsequently you happen to bump into a member of the jury, do not ask him anything about the case or the nights in the expensive hotel. Just acknowledge him and walk away because what happened in the jury room is secret: what happened in the hotel is even more secret, so do not even think about it.

Post-script

Chances are that at the end of it all, you will leave court, feeling drained and with acutely hurt feelings because unfair allegations have been made against you and the fact that the

case did not go the way you *just know* it should have gone. Even when you have carried out your work honestly, professionally and to the best of your ability, you will still feel drained.

Exceptionally, you might get commended by the judge. Do not wallow in false pride because commendations are but temporary aberrations in the miserable lives of witnesses: especially investigators.

You might wonder whether the whole episode and especially the torment in court was worthwhile. The answer is overwhelmingly affirmative, because someone has to take a stand against skulduggers. Besides that if there were no witnesses, there would be no lawyers and then where would we be? It doesn't bear thinking about: innit?