

## Witness Testimony Themes, Cross Examination, & Preparation Consultants – Episode 55 [Podcast]

Article By:

Adam Bloomberg

Merrie Jo Pitera, PhD

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IMS Senior Jury Consulting Advisor Dr. Merrie Jo Pitera explains why themes are important for testimony, how to prep witnesses for cross, and what attorneys can gain from working with consultants. Listen, watch, and/or read the transcript below. (*Part 2 of 2. [See Part 1 here.](#)*)

### **Transcript**

Hello, and welcome to the IMS Insights Podcast. I'm your host, [Adam Bloomberg](#).

Today, we're speaking with IMS Senior Jury Consulting Advisor [Dr. Merrie Jo Pitera](#) about effective themes for witness testimony, preparing witnesses for cross examination, and the advantages of partnering with a witness preparation consultant.

Dr. Pitera is a psychology and communication expert with more than 30 years of consulting experience in complex litigation. In addition to being a jury consultant, Merrie Jo has prepared hundreds of witnesses for depositions, trials, arbitration, and congressional hearings. She is a frequent national and international speaker on juror behavior and witness preparation methods.

### **Adam Bloomberg:**

Thank you, Merrie Jo, for explaining how juror psychology influences the way they absorb witness testimony. Could you share additional tips you give witnesses before they take the stand?

### **Merrie Jo Pitera:**

Let's start with how witnesses approach a question. It's really important for a witness to determine if that question is inside their puzzle piece, because when a question is outside their puzzle piece, that's when they start guessing, when they start being evasive. Because they really don't know the answer, and they start waffling or hemming and hawing on the answer. And so it'll be important for them to determine that. So how do they do that? First thing is to listen to the question. Make sure to then consider what that question is, and that they need to ask themselves in that pause. They should

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always pause. Do I understand the question, is this inside my puzzle piece, and then, what is my headline? What is my overall theme that I want to make sure jurors understand my answer that is responsive to the question. And then, lastly, of course, you want to deliver that and make that as part of your routine. Listen, consider, and deliver.

**Adam Bloomberg:**

Alright. So then how do you suggest structuring the answer?

**Merrie Jo Pitera:**

Sure, with that primacy principle in mind, that jurors remember the first thing that they heard. We also have that short attention span so it all ties together. Understanding, that's why understanding the psychology of the jurors is so important. So keeping that in mind, you want to start with your newspaper headline, what is your main point? And then, no more than 2 sentences. You want to keep it short. That's the number one rule. And if you do that, you should be able to remember to answer the question asked.

**Adam Bloomberg:**

So how do you suggest handling responses to cross-examination questions?

**Merrie Jo Pitera:**

Well there's lots of philosophies in how to handle that. You know, when I'm prepping a witness, I'm thinking about the style in which they are answering. So, this isn't an exclusion to exclude any other advice, but the 2 considerations that I look at is 1) controlling the tempo, and 2) reframing the response. So, backing up to control the tempo, opposing counsel likes to speed up their question and answer. And mainly because psychologically, when we're talking to someone who is a fast talker, we tend to speed up with them. And it is a, it's a strategy that opposing counsel uses to get you to stop listening as a witness. If they're speeding up, and you're in your quickly jumping on the answers, then you tend to stop listening, and not really take the time to process the actual question. And then sometimes they can snooker the witness by throwing a bit of a zinger in there, or just a nuance ever so slight that the witness, had they had slowed down, would have heard it. So, take ownership of the tempo. Just because they speed up, the witness should still take their beat, and should still answer. They should take ownership and control of their answer.

And then second, was the reframing of the response. So, we don't want, well, let me put this way. New witnesses and some seasoned, but mostly newer witnesses, like to use the question as part of their answer. It's like a wind-up. They'll pick up the words of the question, and then give their answer as part of that. And what happens is they're inadvertently picking up the plaintiff's characterization. And we don't want to mirror the words of the question in the answer. So, for instance, I was prepping a witness the other day, and his job was to evaluate some documents. And the practice cross-examination question was, "So, sir. So, essentially what you're doing here when you're evaluating these witnesses, you're putting your own spin on these documents. Isn't that correct?" And the witness's gut reaction was, "I'm not putting spin on the documents." And he repeated the negative connotation that the opposing counsel put into the question, and then continued with his answer, and that undercut his entire answer. He should have had an affirmative answer, and not picking up the words of the question.

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**Adam Bloomberg:**

So any more tips on handling cross examination questions?

**Merrie Jo Pitera:**

Adam, I'm full of tips. I'll just give you a few more. First is to stay calm. Cross-examination can get people anxious. We want to stay calm. You want to keep your calm demeanor as well. You don't want to all of a sudden close off to cross your arms and like you're getting into battle mode. Okay. Because we always want to remember the truth is the truth. We don't need to get defensive or angry, or we don't need to fight about the truth. So, we want to always stay calm and telegraph that through our demeanor as well as our voice. The next would be to use your themes proactively to get out of a corner. That's one way to use your themes. The other is, that if you are, if you used your themes, which you should have, or a witness should have in their direct examination, that should carry over to cross, because you want your direct and your cross to be very similar. Again, you want to stay calm in direct and cross. Have the two match. You want to also have the same, the same messaging. Just because you're getting a question on cross doesn't mean your answer should change. The two should be the same. If you said it on direct, then it set you up for cross, and you should use your theme.

**Adam Bloomberg:**

Now you've mentioned themes, can you talk about how important that is?

**Merrie Jo Pitera:**

Absolutely. A theme is, you know, I've also used the word headline, newspaper headline, as well. The themes really help the jurors understand and organize the information. Themes can help connect complex evidence to the jurors' experiences and their beliefs. And what makes a good theme is something that's simple and short, so it has to be somewhat like a newspaper headline size. Okay. It needs to be repeatable and memorable. So ideally, your key headlines from your testimony form the boundaries also of your witness puzzle piece. So let me give you a quick example. Something that would connect it to people's personal experiences. Sometimes they're just colloquial themes, like "hindsight is 20/20." There are many cases where opposing counsel is retrospectively calling into question the decisions that were made years ago, and they were using hindsight bias to make those decisions look like they should have been more obvious today, right? They should have been obvious back then. So, having a witness say, "Yeah, well, hindsight is 20/20," that's memorable, it's repeatable, and it's short, so that's a good theme to use in those situations.

**Adam Bloomberg:**

I've heard a lot of attorneys, really good ones, use long, compound questions, and right at the end they say, "Correct?" or "True?". How do you approach that?

**Merrie Jo Pitera:**

Oh, yeah, well, you know what I, what's interesting about that that you brought that up is, I've done post-trial interviews with jurors, and then I ask them particularly, you know, what made a witness

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persuasive or least persuasive? And I've had, I remember one in particular, but I've had several that have alluded to this. One juror said, oh, it was that one witness that kept telling the plaintiff's attorney he was correct all the time, because it was an interview for a defense client. And I said, "Well, what do you mean by that?" "Well, every time the plaintiff attorney asked him a question, he said, 'correct, correct.'" So, it's called, there's a phenomenon called the "sleeper effect" where they remember the impression, but they don't remember the original. What went with it. And so the impression was that the opposing attorney was correct all the time. So, it's really important that, not to minimize, no one can ever eliminate, but we want to minimize the use of "correct," "true," and "fair." And interestingly enough, "Yes" means the same thing, but it doesn't have that semantic strength to it like "correct," "true," and "fair" do.

**Adam Bloomberg:**

What about when attorneys often use "always" or "never" in questions?

**Merrie Jo Pitera:**

Well, they're trying to box a witness into a corner. And, there is an exception to every rule, right? You can't always do something or never do something. And we don't want to witness to say, "Yes, we always do that," because invariably there's an exception. Because every situation is handled very differently, and they have to be responsive to what's in front of them. Whoever that might be, a safety director or any of those folks who are handling a procedure of sorts. And so how do you answer that? You don't want to sound wishy-washy. So again, everything in moderation when they say, "always" or "never." Well, it depends on the situation, or we can say things like, "Well, that's one thing to consider, but there were other things to consider." So, it's not like the only thing and all when we think of always or never.

**Adam Bloomberg:**

So I've got a headline: Top Themes for Witnesses. What do you got?

**Merrie Jo Pitera:**

Well, I have a few. When I do a witness prep, I really want the witness to remember these things. Listen, listen, listen. They need to listen to the question and make sure they're answering the question asked. Second, "everything in moderation." You're never going to have a perfect, perfect testimony. You're going to say "correct" instead of "yes." You're going to do those sorts of small things. You might repeat the words of the question in your answer, but everything in moderation. I call them. I call them "shock collar" moments. When you realize you've done it, wake up, start listening again. Then third is, as I said, "sugar never vinegar." We always want to take the high road, because the truth is the truth. We only buck up when they're going after our integrity, because we never want to take that lying down. But, we also want to make sure we don't get aggressive about that. We want to handle that with dignity when we do that. And next is, we want to have short, direct answers. For all the reasons I've discussed, helps a witness appear knowledgeable, and it certainly helps jurors' comprehension and their ability to absorb that information. And then, lastly, every witness, new witness or seasoned witness, it is helpful for them to practice, practice, practice.

**Adam Bloomberg:**

You've given us a lot of solid information here. Now, there's some very talented attorneys out there

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that like to do witness prep on their own. Can you talk about why it's good to have an outside consultant doing witness prep versus the trial attorney?

**Merrie Jo Pitera:**

Well, there's a couple of reasons. I have spoken to a lot of, as other consultants I'm sure have, talking to a lot of jurors after trial, and have a wealth of knowledge from jurors who tell us what increases and decreases credibility. All the things I've talked about have come from those exit interviews and from jurors in our mock trials as well. So it's a really robust database that we have of knowledge to pass along to a witness. The other thing is that we can also be the bad guy. So, if you do have a problem witness, sometimes the attorney wants to preserve their relationship with that witness, and I can come in, and in a nice way, I don't need to be the bad cop per se, but I can deliver the tough, the tough messages. And that they focus on me and not the attorney. And that helps, still, the attorney keep that positive relationship with the witness. And then, lastly, I provide a lot of good tools for the attorney as they prep in future sessions. I have a PowerPoint that I've put together over time, that helps teach these lessons learned that we've talked about.

**Adam Bloomberg:**

Okay, so you've been doing this for 30 years. Jurors have seen a lot of changes in that time – economy, politics, natural disasters. In the next 10 years, what trends do you see as emerging when it comes to how witnesses are prepared for depositions or trial?

**Merrie Jo Pitera:**

When we think about what are the characteristics that folks use to judge credibility, and that confidence, that doesn't really change. That has been robust over time. I have examples from 1998 of witnesses, and jurors today, in 2023, are using the same cues to judge those exact same behaviors, doesn't matter if it was in '98 or in 2023. Those cues are robust, and they have stood the test of time over time. What has changed, and it's been around for a while now, or the way in which the cross-examination questions are asked. And those "reptile" questions are still going strong. So, and I imagine, there's new ways to twist them, and new ways to ask them to, to what I consider snookering a witness and a witness who isn't savvy enough to see what opposing counsel is doing. So it's real important for experts or any witness to anticipate what those trick "reptile" questions are, and to think about how, what is the theme that they would use to counteract that.

**Adam Bloomberg:**

And you mentioned before, humble confidence. How does that play into, you know, being proactive about your themes as a witness?

**Merrie Jo Pitera:**

Well, your themes will be believable if you have that confidence. If you, if you veer off to the side of arrogant confidence, that witness might be so annoying because that jurors just can't hear his message—might be telling the truth, just may not believe him or want to hear him. The humble confidence is usually a witness who can find that inner teacher, that appears helpful. That's educating the juror as they're telling their truth. And that has a more positive response from jurors; they find that more persuasive.

**Adam Bloomberg:**

Merrie Jo, Thank you so much for spending time with us today. I really appreciate it.

**Merrie Jo Pitera:**

Oh, you bet, if you could tell, I love, I love witness prep, and I can talk forever, so thank you.

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