

# Your Witness—Prepare Before Stepping Into the Sun

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No matter how experienced a witness may be, when the questions begin, whether in deposition or on the stand, the sun comes out and your witness will either be a shining star in the unfolding drama of the case, or feel the heat of the interrogation chamber. Either way, the performance of the witness, will determine to a large degree, the credibility and the weight of the testimony obtained.

Good witness preparation is one of the key ingredients of successful litigation, from first depositions to the final witness at trial. It also is one of the most important responsibilities of lawyers who that must rely on sound testimonial evidence to advance their cases.

Witness preparation methods for deposition and for trial, differ in several respects, but there are some common elements that should be considered every time a witness contributes to the record that will ultimately define the case.

First, it must be remembered that one of the most important elements of good witness performance is an understanding of the process. It is not uncommon, in the busy lives of lawyers, have a brief conversation with a witness a few minutes before the deposition starts, and then push the witness out onto the stage to perform, often ill-prepared and with little understanding of what the next hour, or hours, may entail.

Even in situations where time permits, lawyers preparing witnesses for deposition or trial testimony spend the vast majority of the available time talking about substance—a few key issues that they're concerned about—and little time on form and process. The reality is that in even in depositions, but especially in trial, it is not just the content of the testimony that is considered. In fact, people generally form most of their impressions from their assessment of the non-verbal behavior of others, whether consciously or sub-consciously.

Therefore, of equal importance is the manner of presentation, the non-verbal elements of communication, and the confidence and credibility of the witness, all of which weigh heavily on how the evidence proffered will be judged, and how that testimonial evidence will play out in the overall plan to reach the desired outcome of litigation.

Players in the litigation process, whether they're expert, fact, or percipient witnesses, are all just people. They have their own unique styles, idiosyncrasies and perceptions of their roles in the world and in the process at hand, but they are the very people who have information that will either help or hurt your case. Getting the information you need depends as much on their performance under fire, as what information they may or may not have in their heads.

Here are a few fundamental principles that attorneys should consider as they plan their cases, from early discovery depositions through settlement or trial:

**Principle #1. The information or facts that a witness may be asked to explain are only as valuable as his or her ability to communicate those facts in a confident, logical and credible manner.**

It's easy for lawyers, who have been collecting and dealing with the facts of a case, often for months or even years, to underestimate the importance of basic communication skills in deposition and in trial. Some witnesses are simply poor communicators and the need for help is obvious from the outset. Others may appear competent in their ability to communicate, but unexpectedly falter leaving the record unclear or even damaging.

Even experts who make much of their living testifying in depositions and trial, while they may be geniuses in their particular disciplines, may find it difficult to reduce their expert knowledge to a simple, reasonable explanation that lay jurors can deal with. Often such experts are so confident in their own knowledge that they believe that what they say will compensate for how they say it, leaving jurors (or the deposition record) so muddled that the value of their knowledge and the facts they bring are lost in translation.

In one highly technical patent case, for example, the attorneys recognized the need to get experts out of the rarified world of scientific jargon and actually made the experts present their arguments to a focus group of second grade children until the second graders got the message. From that exercise, language and terminology were carefully selected, then incorporated into the questions and answers that the experts used in trial. The jury easily understood the key points and the outcome was worth millions.

**Principle #2. Witnesses who understand the process and the rules before testifying are more confident, better able to provide information that contributes to case strategy development, and less likely to be tripped up along the way, thus avoiding the need for rehabilitation later on.**

One of the most important things an attorney can do is to sit down with the witness well ahead of time with the specific objective of helping the witness to understand what the experience of testifying will be like and what the expectations of lawyers and jurors will be.

Witnesses need to understand that they have rights too—that they are not victims or detainees, even though, having been ordered to appear, they may feel that way. They need not feel that lawyers who have agendas and motives that are unclear are interrogating them. Witnesses can be empowered to perform well if they understand that, by virtue of the information they possess, they are the most important people in the room and that jurors want to hear and understand what they have to say.

Most witnesses believe, based on what they see on TV and in the movies, that somewhere in the process, someone will be trying to trick or to entrap them. They also worry that an attorney

will ask questions that are designed specifically to destroy their credibility, which can and often does happen.

But, with proper preparation, including helping witnesses to develop an ability to listen critically to what is being asked, and to focus on the specific interrogative words within each question, they will be better able to understand the scope of the questions and refine their answers appropriately. This gives them a sense of greater control over the process and they will be less intimidated or apt to misspeak.

Giving witnesses a "safe harbor" concept or statement that they can come back to, and tools they can use to control the pacing will allow them to interact in a more confident manner with questioning attorneys and the jury, and it allows them to process and respond to each question in a clear and definitive manner. This will enhance not only their own credibility, but the value of the information they lend to the record.

**Principle #3. The behavioral elements of witness testimony, even in deposition, can have a significant impact on how attorneys and jurors evaluate the information that is being provided.**

With the exception of home videos taken at the beach or at a family reunion, we don't often see ourselves as others see us. Seldom, if ever, do we sit down and evaluate how we appear and how we perform. We don't see all the little things that are picked up, consciously and/or sub-consciously, by those around us but which nonetheless, affect the perceiver's assignment of credibility to what is being said. How we look, how we sit, how we maintain or avoid eye contact, our tone of voice—all of these things and many others play important roles in how we are perceived and to the level of credibility that is assigned to what we say, whether under the lights, or in the hot-seat.

One of the best ways to measure the behavioral elements of communicating and, at the same time, of shoring up areas of weakness, is the use of video preparation sessions which allow the witness to see both the problems and the improvements after weaknesses have been recognized and addressed.

An expert witness who had testified many times was sure that he knew how the system worked and that he could handle any examination or cross. He resisted spending time for a video session, but the lawyer paid him for the additional time and insisted. While many of this expert's previous depositions had been videotaped, he had never actually reviewed any of the tapes he had appeared on. After seeing himself responding on video for the very first time, he was amazed at his body language, his lack of eye contact and facial expressions that telegraphed a sense of arrogance that most opposing lawyers love, and most jurors resent. He admitted that, had he been a juror with only what he saw on the monitor to work with, he would not have been very favorably impressed, even though the data he offered was sound.



After some additional work and seeing the resulting improvements on the monitor, he gave one of the most impressive, yet down to earth, depositions in the case. Partly on the basis of his performance in deposition, the case settled well.

**Principle #4. Get someone involved in the witness preparation process whose expertise is in communication, not law.**

Most lawyers believe that they know as much about communicating as they do about the law. Some do. Many don't. This is not an indictment of attorneys, but rather a fact of life in a society composed of many fields of specific expertise. In the medical profession, a brilliant cardiovascular surgeon may be the best in the world at what he or she does, but when the patient has a seriously broken bone, the wise doctor will call in the bone specialist for help. The lawyers most valued by their clients would be the ones who are willing to bring the best resources they can find to the table. Finding someone who understands the importance and the many facets of effective communication may be worth many times the amount one might pay for an afternoon's work with a witness.

Witnesses who have a clear understanding of what the experience is all about and how it works before they are asked to perform, and who are well prepared in advance, will ultimately be greatly appreciative of the attorney's efforts to help them shine. Such a witness, and hopefully the lawyers, clients and triers of fact, will remember a spotlight performance, not an uncomfortable roller coaster ride in the hot seat. ■

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