

WITNESS PREPARATION

Are you concerned about whether key executives are properly prepared to give testimony in a deposition or in trial? Do you worry about whether they fully understand that a deposition is not a conversation? Do you realize that a prepared witness can effectively control a deposition and lessen the risk?

As the breadth and scope of litigation and investigations continue to evolve, more and more corporate executives, across a wide range of industries, are being drawn into the unfamiliar and unsettling environment of being a witness.

Successful enterprises invest not only in the products and services they need, but also in experience and knowledge to maximize effectiveness and improve existing processes. This is an investment in the past, present and future: addressing past issues, improving current performance and protecting against future problems.

Litigation is no different. In addition to case counsel, effective litigation requires investment in other resources: expert witnesses, jury consultants and other specialists such as investigators. One critical area that is too often overlooked is witness preparation.

Witness preparation is a niche practice that requires skills that are developed through years of experience. While many excellent lawyers, including litigators, are not familiar with the techniques that are necessary to properly prepare a witness, or don't consider these techniques as a standard element of litigation functions, the attorneys at Holland & Knight place a high value on this training and can provide comprehensive witness preparation services.

Testimony Is Not a Conversation

Being a witness requires a level of precision and focus that is contrary to normal conversation and is not included in the experience of most executives. Our attorneys work with clients to help them precisely recount the facts and to understand the language and rules of "question and answer" routines. Whatever the issue, the notion that "I'll just go in and tell my story" may be a recipe for disaster for the individual, the employer and the case if somehow the facts get obscured.

Recent high-profile matters, such as Martha Stewart and Bill Gates, have demonstrated that the need for, and challenge of, real witness preparation spans cases of all sizes and subjects. (See "A Lesson for Witnesses," Dan Small, *National Law Journal*, July 27, 2005, attached)

Three Key Elements of Effective Preparation

An effective witness preparation program offers three key elements that are often not the focus of even experienced trial counsel: education, training and perspective. These three elements add value to the case by providing each witness the training to help them best communicate the facts – accurately and confidently.

1) Education

To be effective witnesses, whether in deposition or trial, executives must be educated in the process and language of being a witness, not just in the case itself. Even the best case – with the best trial counsel – can be lost if a witness is not in control, not confident, and not understanding the language, the issues and other key points. Much of this is counter-intuitive and needs to be taught and keenly understood. Being a witness is not a conversation, and in many instances, great conversationalists who have not been trained to understand the process can be damaging witnesses.

2) Training

Learning to be a witness is too difficult, and too foreign, to happen effectively just by listening. It must be experienced. Extensive, realistic mock testimony is one of the most effective ways for a witness to understand the process, learn from their mistakes and appreciate the importance of further preparation. An effective mock testimony requires counsel to come in without the entrenched views of an advocate, seek to expose the weaknesses not only of the case, but of the individual witness, and then begin the process of addressing these weaknesses.

3) Perspective

Bad testimony can continue to be harmful long after the case is over – an unprepared witness' mistakes can be devastating to a company's other litigation, reputation or other interests. Trial counsel is sometimes just focused on winning their case, not educating the witness on - and being sensitive to - broader issues.

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Dan Small and other members of Holland & Knight's Litigation Practice are available to deliver a comprehensive witness preparation program, over a period of several days, to key witnesses throughout the world. We have the substantial

credentials and experience in the art and science of witness preparation. Dan Small wrote the ABA's manual, *Preparing Witnesses*, (see ABA Brochure, Third Edition, 2009, attached) and has written and lectured on the subject to lawyers and executives across the United States. Dan and his team are often called in to work with existing corporate or case counsel to prepare key witnesses. This focused engagement has important advantages, including:

- assisting corporate or case counsel in developing the key issues for each deposition
- bringing a fresh perspective to anticipating and analyzing the questions a witness may face

- focusing the witness on the importance of preparation
- helping each witness understand their strengths and weaknesses
- preparing the witness – including developing review materials, mock depositions and analysis – without competing with other critical case functions or with existing counsel
- adding strength to the existing case as a supplement to the efforts of trial counsel
- creating substantial added value for the client in both the current and future cases through improved witness confidence and performance

If you would like to discuss any aspect of witness preparation further or to learn more about how we have assisted many substantial corporate clients in this area, please contact Dan Small at dan.small@hklaw.com.

The information and materials provided during this program will present general information and should not be used or relied on as legal advice when analyzing and resolving a specific legal issue. Each fact situation is different; the laws are constantly changing. If you have specific questions regarding a particular fact situation, we urge you to consult with competent legal counsel about your specific facts and the specific laws that apply.

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