

## Seven big mistakes lawyers make

by Daniel I. Small

Published: October 29th, 2013



Before a lawyer can convince a client to take on the burden of preparation, the lawyer has to be convinced. Unfortunately, while law schools may do a good job of teaching legal principles and theory, they often ignore the true focus of real world legal practice: the client.

Just as the political campaign mantra "It's the economy, Stupid!" was designed as a reminder of what was most important, perhaps law schools should add: "It's the client, Stupid!" to the inspirational Latin phrases that adorn their ivy halls.

For now, the reality is that too few places really teach attorneys how to deal with clients, and certainly how to teach clients something as difficult and foreign as the process of being a witness.

The commonly accepted notion that lawyers will somehow pick up such skills as they go along is dangerous nonsense. At best, it's a recipe for a long trial-and-error learning process, and real clients with serious problems are the guinea pigs. As a profession, we can do better in this important area.

Meanwhile, even experienced attorneys may share some common misperceptions that lead them to fail to prepare a client/witness adequately. A failure in preparation is a failure in representation. Don't make these same mistakes.

### 1) "I'm too busy."

No matter how busy you are, it's hard to ignore a formally scheduled deposition or other appearance as a witness. Yet it's often too easy for a lawyer to ignore the preparation stage. After all, the client usually doesn't understand the importance of preparation, and the lawyer has other more immediate demands on his or her time.

However, you're not properly representing your client if you allow an appearance without thorough preparation. Either find the time to work together or don't take on the representation at all.

There are several ways that you can make the time you spend more efficient. For example, give the client the appropriate introduction memo to read in advance. Encourage your client to read it carefully before your next meeting and to write any comments or questions on it, then use it as a basis for discussion every time you meet. Second, use an associate or paralegal to organize documents, do an outline of the matter to serve as a base and even to conduct the practice questions. Still, nothing can replace the substantial time commitment required for this process.

Some years ago, while serving as general counsel to a national health care company, I gave a talk to a group of doctors on litigation, with particular emphasis on the importance of careful preparation before giving any testimony or statements. Toward the end of my talk, a doctor in the back raised his hand and said, "That sounds great, but when I had to give a deposition recently, my lawyer called me up and told me to meet him a half-hour before my testimony, and we'd prepare then. What should I have done?"

What lawyers should understand, even though clients have no reason to, is that that's not preparation — that's malpractice. Get another lawyer. Preparing someone for the unnatural and challenging witness environment takes a commitment of time and effort from both lawyer and client.

### 2) "The client's too busy."

Many clients don't see, or don't want to see, how vital witness preparation is. They don't want to take the time out of their busy lives to pay a lawyer to help them do something that they don't think they need help doing in the first place.

The lawyer must accept the obligation to push — hard — to overcome that reluctance. None of us like to push a client like that, but we're not doing our jobs if we don't push. The most important battle we fight for our clients is sometimes *with* our clients.

Again, there are ways to work with the client to help accommodate the competing demands of preparation time and a busy schedule. Nights and weekends may sometimes be the best times. Although preparation is done best in blocks of uninterrupted time that are several hours long, I have in some instances conducted pieces of the process during long flights, limousine rides and even international telephone calls.

Flexibility, though, only goes so far. The need for time can be a constant battle, but it is a necessary one.

### **3) "All witnesses are created equal."**

Part of the challenge of properly preparing witnesses is that it can't be done in a standardized, cookie-cutter way. A client recently told me about a prior experience in which she had to give a deposition in a discrimination case brought against her employer.

Her employer's lawyer "represented" her (with no apparent regard to the conflict issues) and as preparation merely gave her what was clearly a canned speech, having little to do with the sensitive issues in the case.

In fact, witnesses differ enormously depending on their background, personality, education, experience, profession, and involvement in the issues or events being addressed. What might be an appropriate preparation for one witness may be useless gibberish to another. You must adapt your preparation accordingly.

### **4) "You never know what they'll ask."**

Attorneys sometimes limit their preparation — either intentionally or unwittingly — because they don't know how to anticipate what a questioner will ask. They reassure their clients by telling them that such ignorance is normal: "You never know ... ."

However, the fact that you rarely know all the questions doesn't mean you can't anticipate and prepare for many of them. We can't eliminate every surprise that our clients may face, but we can and should help minimize the number and severity.

There are a variety of ways that a lawyer can, in fact, "know what they'll ask." They include the following.

- **Wear their hat.**

Constantly challenge yourself, those working with you, and even your clients to put on the other side's hat. How would we view a set of facts if we were looking from their side? What questions would we want to ask? Brainstorm these issues with and without the client present. If resources allow it, assign someone to play that role and prepare questions accordingly.

- **Use what's out there.**

Whatever the nature of the process, there are likely prior transcripts, discovery or standard guides or manuals (sometimes CLE materials) that will help you to understand and anticipate at least the general outlines of the questioner's approach. Have you fully searched the other side or the issues on the Internet?

- **Use their stuff.**

One of the side effects of big government is that bureaucracies often develop strategies secretly in one office and disclose them publicly in another. Some agencies' in-house manuals are actually available, such as the U.S. Department of Justice Manual published by Prentice-Hall, which includes the standard Advice of Rights for grand jury witnesses and other grand jury information.

Other agencies require you to work a little harder. For example, the Securities and Exchange Commission's internal manual, "Guide to Taking Testimony in Investigative Proceedings," has been made available through the Freedom of Information Act. It contains the SEC's standard script of questions, which helps to prepare witnesses for the kind of extraordinary detail that the SEC pursues in almost every case.

- **Use other lawyers.**

Who else has been questioned or testified in the matter? You can make lawyer-to-lawyer contacts to get file memos, transcripts or even just oral reports from counsel of what was asked of others and what might be asked of your client.

### **5) "Preaching, not teaching"**

You can tell a client the required language for a legal document, or what forms must be filed with a particular agency or court, but you can't tell a client how to be a witness.

That has to be taught. Doing it successfully means avoiding lecturing and preaching and instead using a variety of methods to work together toward understanding. "Just do as I say" rarely works with our children on even simple things; it certainly won't work with clients on a far more complex and difficult subject.

The key here is one of the same things that we tell clients: Listen. Invite questions, ask for feedback, ask questions, and generally do whatever it takes to make sure that you understand what your client needs in the situation.

If you get on a roll talking at your client, stop to ask for questions or to see what else would help them. Real learning happens in that kind of back-and-forth exchange.

### **6) "The law is the law."**

As a lawyer, you spent three years of law school and the span of your career — however long it's been — learning to speak a strange language: legalese. To help a client understand the challenges and choices he or she faces as a witness, you must relearn English.

The more legal issues that are involved in the matter or in your client's appearance, the harder you have to try to avoid legalese. A client who's learned the legal terms but not what they mean has truly learned just enough to be dangerous.

### **7) "Do I need to draw you a roadmap?"**

Yes, you do! I am constantly amazed (and pleased, when I'm the questioner) to see witnesses who may have been prepared on the facts, and perhaps even on how to answer questions, but not on the simple mechanics of what's going to happen.

As a result, they walk into a strange room in front of strange people and are intimidated and overwhelmed by the most basic logistics or procedures. They quickly become shaken up. Whatever preparation they did is largely lost, and they start the questioning at a severe disadvantage from which they may never recover.

There's nothing condescending about being careful. Take the time to walk through exactly what the witness can expect. A big part of counsel's job is to make it less strange (and, hopefully, less frightening) for the client by making it more familiar.

On some level, all lawyers know that preparation is important. But there are so many easy excuses to chip away at it, and clients are rarely sophisticated enough to understand what's happening and what's wrong. Don't fall prey to those temptations. Find the time and effort to do it right.

*Daniel I. Small is a partner in the Boston and Miami offices of Holland & Knight. A former federal prosecutor, he is the author of the American Bar Association's "Preparing Witnesses" (3d Edition, 2009). He will be the featured speaker on "Ethical Witness Preparation: Drawing Difficult Lines" at the Boston Bar Association on Nov. 6. He can be contacted at [dan.small@hklaw.com](mailto:dan.small@hklaw.com).*

