

Three big mistakes witnesses make

by Daniel I. Small

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When someone is called to be a witness of any kind, no book or outsider's advice can replace the need for effective preparation. That's obvious to anyone who has experience dealing with this question-and-answer format; however, it's not so obvious to many laypeople — or lawyers.

There are lots of seemingly good excuses for a potential witness not to bother with preparation. Let's consider three of the most common, and how counsel can respond.

1) "I'll just tell my story."

Parties to litigation are convinced they know their cases and don't need outside interference. For someone who is not a party or a target but just an "outside" observer, being a witness can be a large and disruptive imposition. The notion of spending even more time just preparing to be a witness can seem like an unnecessary burden.

Moreover, since the witness knows what the truth is, why does he need someone else telling him what to say? The temptation to "just go in and tell my story" without preparation can be great. It can also be an invitation to disaster.

Both lawyer and client must understand that the main goal of preparation is to level the playing field on which the client will be questioned. Otherwise, it's an extraordinarily unbalanced field. Think about all the advantages that most questioners have before they walk in:

● Experience

Whether the questioner is a lawyer, investigator or other professional, he or she has probably spent a lifetime of education, training and experience preparing to question witnesses. This is what questioners do for a living. What's unnatural to the witness is natural to them, and they have spent a career learning to ask questions in what will seem like a strange new language.

● Preparation

Questioners may have spent days, weeks, months or even years working on the matter. They have explored inside and out a subject area that is only a vague memory to everyone else.

● Documents

They have reviewed the relevant documents carefully and are ready to compare any answers to those documents.

● Other witnesses

Questioners probably have questioned or plan to question others in the matter, using what they learn from them to generate questions to ask now and comparing the answers to those of others under a microscope.

● Script

Pulling together all of the above advantages, questioners have spent time specifically preparing their questions. They may have a script or a list of questions, documents ready to show, and other ways to make sure they are prepared. They know where they are going. The witness does not.

A potential witness and his or her lawyer should think about that list carefully. How many of the preparation tasks has the witness done? Let's assume that you don't act foolishly in other important matters. Why would anyone be foolish enough to ignore all of the disadvantages and just walk in unprepared?

The reality is there are no shortcuts. Spending time on preparation is the only way to make the time your client spends being questioned less painful, more effective and ultimately shorter.

You're walking into a strange environment with a great deal at stake, where everyone else is experienced, comfortable and prepared. You can't adequately prepare for this challenge without professional help, period. Some of the best salesmen, orators, thinkers and executives have the toughest time making the transition to this unnatural environment. Lawyers, of course, are among the worst.

2) "It's too expensive."

Expense takes many forms: time, money, anxiety and more. Being a witness can take an enormous amount of each — too much, in many people's eyes.

Even if an outside party is paying a witness's legal fees (an employer, liability insurer, D&O insurer — be sure to ask), it cannot make up for the lost hours and days in both preparation and actual testimony.

However, inadequate preparation can lead to poor testimony, and that can both be far more painful and time-consuming to give — and return to haunt the witness in so many ways down the road. Bad testimony is the gift that keeps on giving. Take the time now, to avoid the time later.

When it comes to money, there's no doubt about it — today's legal fees are extraordinarily high. If the witness has to pay a lawyer, it adds a new dimension of pain to an already burdensome experience. However, the real issue with cost is always relative. Is true preparation expensive? Yes. Is it too expensive? Compared to what? What's the alternative?

Saving time and money up front by being a witness without counsel or without extensive preparation can cost dearly later in time, money and heartache. Witness preparation is too important. It's the wrong time and place to save.

3) "I didn't do anything wrong."

This is the toughest and the most common misperception. Even people who use lawyers all the time for real estate, business or other purposes may share the common notion that, as a witness, they need a lawyer only if they have done something wrong. Counsel has to understand the misperception and help the witness to get around it.

I tell clients to think of me as their tour guide through a strange and dangerous jungle. Given the harm that can come to people as a result of these inquiries, whether or not they've done anything wrong, a witness is foolish to enter this world alone. As the old maps of the world used to say in describing unknown waters, "This way be dragons."

Moreover, even if the witness "hasn't done anything wrong" before getting onto the witness stand, the testimony itself may create a wide range of issues or problems. For example, the witness usually won't know what has gone on in the matter before, or who has said what to whom. A lawyer may be able to find those things out through joint defense agreements and other avenues to help the witness avoid unnecessary conflicts and other pitfalls.

In that and other ways, a lawyer can help guide the client through the risky process as safely as possible.

Potential witnesses should never feel awkward or defensive about undertaking extensive preparation. It's their right and it's the right thing to do.

Finally, having chosen a lawyer to prepare with, it's critical that the client use that person exclusively. The client should not talk to anyone else about the matter. No other conversation is privileged, and questioners often love to ask, "Who else did you talk to about this matter?" If that makes a client uncomfortable, I encourage using the lawyer as the bad guy: "Gosh, I'd love to talk about this with you, but my lawyer told me I can't." Otherwise, witnesses open

themselves (and those they speak with) to unnecessary questioning.

If you listen carefully to a witness's reluctance to prepare properly, you'll usually hear some version of one or all of the three big mistakes.

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