What it means to prepare a witness

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Too many lawyers — including some very good ones — don't prepare witnesses adequately because they fail to understand that being a witness is dramatically different than anything else the client has experienced.

Testimony is not a conversation. Much of what makes for a good conversation makes for bad testimony. And what it takes to be a good witness is often contrary to our normal experiences.

As a result, it takes an extraordinary level of preparation to learn to do it right. Too many lawyers' idea of preparation falls short in at least two key ways: It's not comprehensive enough, and it's not tough enough.

Not comprehensive enough. It happens too often. We've been working hard to prepare a witness for hours or days, and he expresses surprise at the length of the process: "I was deposed before, and my lawyer just told me to meet him half an hour before the deposition and we'd prepare."

That's not preparation; that's malpractice. True witness preparation is an extensive and intensive multi-step process. It demands a high level of time, energy and effort from both client and counsel.

Not tough enough. Lawyers don't serve their witnesses well by being too kind and gentle in preparation. I tell witnesses that the tougher and more realistic we are with them, the better prepared they'll be for the real thing.

At the end of the whole process, every witness should come out of the experience and say what many of our witnesses say to us: "You guys were much tougher!" That's a sign of success, relief and high praise. Make it happen.

There are seven key steps to the process, each requiring careful thought and thorough implementation:

1) Introduction

Imagine sitting down on a park bench and having a total stranger come up and ask you about your most private details and troubling secrets. You'd think the person was crazy and certainly wouldn't answer in any depth.

Why are we lawyers so arrogant that we think we can do that with someone just because they have the label of "client" or "witness"? You can't. It won't work. You're a stranger, no matter what the environment — whether you're representing the person personally or you're an agency or a corporate lawyer. The fact that you're a stranger makes the person doubly uncomfortable.

Take the time to get to know your witness and get comfortable with each other, both before you meet, through other people or the Internet, and at the outset of the meeting. What do you need to know about your client's background? His interests? His family? What does the client need to know about yours? How can you find a common bond? The time invested up front is well worth it.

2) Review the facts

Encourage your witnesses to go over as much as they know about the likely subject matter of the questioning: who, what, when, why, where, how? What do they remember and what might someone else remember?

Going through it the first time is rarely enough. Go back over the facts in slow-motion to catch more of the details and issues. I tell witnesses that sports is repeated in slow motion because in real time it happens too fast for most people to follow and understand. Nobody can talk about it and explain it as fast as it happens. It's the same for witnesses.

Witnesses often ask, "Should I study?" The question of whether or how much to review past documents, events and so on will vary from case to case. Sometimes it's important to be familiar with the facts or documents to anticipate and rebut biased questions. Sometimes you risk re-creating inaccurate memory. Sometimes it may be best to let sleeping (or forgotten) dogs lie. This is an important issue for you and your client to consider and discuss.

3) Review the process

No matter how many episodes of their favorite legal TV show they've seen, no matter how many times they've been a witness, don't make the mistake of assuming that witnesses really know or understand the bizarre process.

Apologize, if you feel you must, for erring on the side of too much information, but then do precisely that: err on the side of too much information.

Every witness needs to hear and understand the basics of who, what, when, why, where:

WHO — Who's involved in the litigation? Who will be there? Who will ask questions? Who will object? Who will see/read it later? Who else may testify, and what will they say?

WHAT — What happens when and in what order? The oath? The questions? Which side when? What should I bring? What should I wear?

WHEN — When does it start/end? When are the breaks? When does the day end? When do I hear more about it?

WHY — What is the meaning, importance and goal of this testimony, for each party concerned?

WHERE — Where is it? How do I get there? What type of place/what type of room?

4) Put it together

Understanding the facts and the process, how do you communicate effectively in a question-and-answer format? The facts do not change, but the method of answering questions takes a lot of getting used to. Most of witness preparation — including the "10 Rules," which will be addressed in later columns — is directed at that crucial part of the preparation.

5) Anticipate problems

Now is the time to identify things that may be potential problems and prepare accordingly. Witnesses can have a large range of concerns. Counsel has to ask and listen for them.

For example, one common problem is nervousness: "How do I avoid being nervous?" "How will I be able to think clearly when I'm so nervous?" I give witnesses the same answer I give when I teach trial practice to law students and lawyers: Don't be nervous about being nervous. Everyone is nervous and that's OK. You should be nervous; this is an important process.

Moreover, I want you to be nervous. It's the best way to sustain the kind of energy and intensity required to handle this process properly.

So how does your witness overcome it? By not worrying about the disease and just dealing with the symptoms. Tell your client: Don't worry about the fact that you're nervous; just think about what it is you do when you're nervous and deal with that. For example, if you talk too fast when you're nervous, make an extra effort to slow down. Whatever it is, do the best you can, but don't worry about it.

Anticipate other potential problems and address those problems before testimony is given. Does your witness need a translator? Does the witness stutter? Does he need any special accommodations? What are the witness's fears about the process?

Finally, prepare the witness for questions about the preparation! If the witness is a client,

explain the attorney-client privilege and that the questioner may ask about the logistics of preparation, but not what was communicated, orally or in writing. If the witness is not a client, make sure he understands the absence of privilege so he's not caught by surprise.

Moreover, make sure he understands your first, last and fundamental message: Always tell the truth.

6) Dry run

Some years ago, I had to help teach my twin girls to ride bicycles, with all the scrapes and bruises and tears that came with that process. It was traumatic. All I could hope was to help cushion the blow when they fell and console and teach them when it happened. The same is true for teaching someone to be a better witness.

No amount of discussion can fully explain the question-and-answer process. Like anything difficult and unnatural, doing it right takes practice. The best approach is to do a dry run so your client can experience the process firsthand. It doesn't need to be formal or cover all the possible topics as long as it gives a clear sense of the process.

The tougher and more realistic it is, the more helpful it will be to the client in the long run. I often have another lawyer in my office ask the questions, both to make it less awkward for everyone in role-playing and to show witnesses how I might act in representing them.

Do a dry run with every witness. You'll be amazed at how productive it is. After you've gone through all the background information, reviewed the facts and the rules with them, they can see it in practice. Ideally, a dry run should be recorded in some fashion, if practical, and if covered by the privilege.

Adapt the dry run to the proceeding. If you're preparing a witness for a deposition, you may want to have a transcript of the dry run prepared, since the goal of a deposition is to produce a clear and accurate transcript. That will emphasize the strengths and weaknesses of the witness's testimony, allow him to appreciate the final product, and address any weaknesses. Most clients have never seen their spoken words in print. It's a revelation.

If you're preparing someone for videotaped or live testimony, the transcript isn't quite as important, but the appearance is. The important thing is to record the testimony in whichever way it will help you and your witness.

7) Review transcript

Another great benefit of doing a dry run is to generate and review a transcript or video. Depending on the case and the resources, that can mean anything from a full, videotaped session with a court reporter to a simple recording that can be typed up for review. If there are inaccuracies, it can prepare you and your client for the inevitable mistakes in any real transcript.

Reviewing a video and/or transcript is the best way for both lawyer and client to see and understand how and why the rules we will discuss in later articles work, and what your client can do better.

The witness environment is terribly unfair and deceptive. It has all the appearances of the questioner being in control. If the witness and counsel accept that deception, they have lost. This is, after all, the witness's testimony.

True witness preparation is all about leveling the playing field and helping the witness to take control. You can and must make a real difference.

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