

## Witness Preparation: Teaching Lay Witnesses to How to Master the Challenges of Testifying in Court

At trial, cases often hinge on jurors' perceptions of key witnesses. The impression a witness makes can have a decisive impact on the outcome of a trial. Yet, all too often, witnesses are given only cursory help preparing to testify. Frequently an associate is assigned the task on the eve of trial. Unfortunately, witnesses who fail to fully understand the proceedings or the significance of each aspect of their testimony often become nervous and confused; with potentially disastrous consequences.

Witness preparation need not be an overwhelming task. This article describes techniques for witness preparation appropriate for both lay and expert witnesses.

### Stages of Witness Preparation

#### Stage I

Witness preparation for lay witnesses can be isolated into three stages. Stage I involves orienting the witness to the courtroom; including explaining the roles of the courtroom participants and the basic rules of evidence involved in lay testimony.

It is important to provide a prospective witness with a review of the ground rules for direct and cross examination as well as an explanation of the objections likely to be made. Essentially, the attorney should educate the witness so that he or she understands the nature of the proceedings and is less likely to be startled during direct or cross examination. Such distractions negatively impact a witness, and are needless if adequately addressed prior to trial.

Helping a witness understand the overt and covert reasons for objections allows them to gain confidence in their testimony. When anticipated objections do arise they feel knowledgeable and confident; significant factors in reducing situational anxiety associated with being "on stage."

It is easy to neglect this orientation stage, as it almost seems trite. But from the witness's perspective, it is not. For witnesses who have some familiarity with court proceedings orientation is often a refreshing review, and new information, inevitably, is imparted. For those for whom the information is completely new, an orientation is helpful and appreciated. Many witnesses are quite embarrassed to admit that they are unfamiliar with court proceedings and will not ask the fundamental questions. Thus it is important that the attorney matter-of-factly, but effectively, review fundamentals of the courtroom with all witnesses.

#### Stage II

In the second stage, attention is directed to the content of the witness's testimony. Individuals process information best when it's approached from the global to the specific.

When witnesses are provided with an overview and then with details to the appropriate elements of the outline, they are better able to understand the overall nature of their testimony. It is important that the witness has a conceptual understanding of the objectives of their testimony. Merely going over a witness's testimony question by question, in the absence of an overall context, results in witnesses who become confused and unable to respond effectively during direct and or cross examination. By understanding the case themes and how each element of their testimony is related to a theme, witnesses are better able to be effective on the witness stand.

### Stage III

While many lay witnesses may come to understand the nature of the courtroom proceedings as well as the objectives of their testimony, they may often be lost regarding how to communicate effectively in the courtroom. Testifying from the witness stand is an unique experience, unlike most other public speaking situations. Witnesses need guidance in courtroom communication. This is where a video camera can be a very useful tool. All too often, witness preparation is conducted without the benefit of video playback. Suggestions by the attorney may be difficult to grasp the first time through. It is one thing to be told to speak more slowly, and quite another to watch oneself speak too rapidly on video. The latter is a more powerful demonstration of the problem and a better tool for learning to correct it. We learn much better by seeing and doing than by merely listening.

There are several things one wants to point out to a witness. Researchers have consistently found that those who communicate using powerful speech are far more effective and more credible than those using powerless speech. Powerless speech is characterized by testimony in which a witness frequently hedges or responds with "I guess," "I suppose," or where there are abundant hesitations. Overly polite speech patterns or deference to authority, with comments such as "Yes Sir" signal powerless speech. Those who engage in powerful speech do not exhibit such behaviors. Video allows the attorney to point out instances of these behaviors to help a witness correct them.

The choice of words a witness uses is important. For example, depending upon whether the witness is testifying for the plaintiff or the defense, the witness can create entirely different images for the same event. In a case involving the release of formaldehyde from a rail car that blanketed a small rural town, defense counsel found it was almost automatic for their own witnesses to refer to the incident as a "toxic spill," having adopted this language from the massive press coverage surrounding the grounding of the Exxon Valdez. Counsel for defense needed to assist witnesses in understanding the importance of their choice of words and help them reflect on what they truly meant to convey. Adjectives such as an "incident," "a release" or a "venting," rather than a "toxic spill," seemed more in keeping with their witness's intentions. The amount of damages awarded by mock jurors differed significantly based on the nature of the references to the incident.

Witnesses need to be cautioned not to adopt opposing counsel's language inadvertently during cross examination. Opposing counsel will often suggest characterizations of events, and draw the witness into adopting the characterization. For example, in the incident above when opposing counsel asked, "During the four hours that the tank car was spewing the formaldehyde, what steps were being taken to plan evacuations?" A witness who begins a response by addressing the evacuation procedures implicitly agrees with the characterization of the event as "spewing." Rather, the witness should restate the question. For example, "At the time that the venting was first observed no evacuation procedures were under consideration, as venting is a frequent and normal event."

It is often helpful to suggest to a witness that their task is similar to a teacher's. By conceptualizing their role as an educator a witness can take more control of their testimony. Moreover, they often find that viewing themselves as teachers makes juror note-taking less distracting, and the absence of juror eye-contact less disconcerting. Many witnesses report that when jurors are not looking at them, they worry that their testimony is not being well received. Witnesses must be taught that jurors' attention often fades in and out and they don't glance steadily at a witness. Teachers are familiar with such audience practices, and usually do not personalize them.

Whenever possible a witness should be assisted in characterizing his/her testimony using numerical references. When asked, "Were there reasons for your denial of the plaintiff's claim?" a witness might respond "yes," and recite a single reason. The attorney must then ask, "Are there any other reasons..?" It is far more effective for the witness to say "Yes, there were three primary reasons," and then elaborate. Numerical references invite jurors to take notes. Furthermore this technique aids witnesses in organizing their own testimony, and prevents their failing to mention a significant point.

Of course, the attorney may not tell a witness what to say, but it is the attorney's role to help the witness learn to communicate effectively. Therefore it is helpful to show a witness a specific, weak portion of their videotaped testimony and immediately assist them in improving that segment. We learn better by observing our mistakes and practicing the corrected responses. Merely pointing to a segment in the video and saying "Don't do that when you're really on the witness stand," almost guarantees that the behavior will be repeated. Rather we should take time to re-formulate the question and allow the witness to answer it again.

A common concern many attorneys share regarding witness preparation is that too much preparation may make a witness look stilted and rehearsed. In fact, the opposite is true. Witnesses who are effectively prepared report feeling greater confidence in their testimony, and confidence leads to increased ratings of credibility. Several years ago, researchers compared the persuasiveness of two groups of eye witnesses to a staged theft. One group received a seven minute briefing on how to handle cross examination. The other group received no preparation. Both groups were then cross-examined in separate trials. Jurors rated the eyewitnesses for confidence and credibility. The prepared witnesses, who reported they felt more confident, also appeared more confident to jurors.

Moreover, their testimony resulted in convictions 50.5% of the time. The conviction rate for the trials in which the eyewitnesses had received no preparation was 30.5%. Witnesses' self-reports of confidence were correlated with jurors' impressions of them as confident witnesses, and their confidence was obviously effective in enhancing their credibility on the stand.

In learning any new skill, it has long been established that spaced practice is better than massed practice. It is better to devote four two-hour sessions to witness preparation than two four-hour sessions. When witnesses have an opportunity to process what they have learned between sessions they are much more likely to master the skill of testifying effectively.

In summary, witness preparation is more than a brief meeting with your witness. Effective preparation involves helping witnesses understand the courtroom environment, hone their message and communicate clearly and convincingly. Time spent preparing your witness will pay large dividends in trial.