

The Importance of Witness Preparation

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Every key witness should be afforded the benefit of at least one role playing session that includes both direct and cross examination. As a general rule, the attorney who will be performing the direct examination during trial (or who will be present during the deposition) should perform the direct examination during the practice session. However, it is usually not a good idea for the same attorney to conduct the practice cross examination. It is better to have a colleague within your firm play the devil's advocate. If nothing else, you do not want to spark any underlying resentment within your witness, nor do you want your witness to think you can turn on him at the drop of a dime. It is better to have an associate who is uninvolved in the case give your witness a sample of what will happen when he is on the stand. If you know the witness will be subjected to a difficult line of questioning by an aggressive attorney, you are not helping the witness (or your case) by sugar coating the event and giving him a false sense of security. The closer you replicate the actual experience, the more benefit the practice session will be to your witness. After a practice session in which the witness experienced a tough cross examination, have your colleague chat casually with the witness for five or ten minutes before leaving. Doing so seems to help the witness understand that the attorney (both your partner and opposing counsel at trial) is just doing her job.

One way to maximize the benefit of witness preparation is to videotape the session. Videotaping a witness during the practice session is one of the best ways to help him understand how his behavior is going to be perceived by the jury. You can tell a witness everything he is doing that makes him look nervous or confused but it is much more effective to let him see it with his own eyes. However, timing is an important consideration with regard to showing a witness a videotape of himself. It is usually better to wait until the witness has shown some improvement so he can see the "before and after." If you show a witness a videotape of himself too soon it can cause him to become overly self-conscious of those behaviors, and it may send him into a tail spin. Showing him the good with the bad will help reinforce the former and minimize the latter, and being aware of those improvements will make the witness much more comfortable with the process.

Every practice session should include the following questions: "Did you practice your testimony?", "Did you get help from your attorney or a trial consultant?", and "What did they tell you to say?". Make sure your witness is comfortable answering each of these questions honestly. After all, there is nothing wrong with the truthful answer. Getting rattled to questions about practice sessions makes it seem as if something unethical occurred. If the witness can answer honestly without hesitation the jury will completely disregard the underlying accusation. If the witness tries to make a secret out of the practice session or provides a vague, misleading answer the jury will get the wrong impression. It is painful to watch an unprepared witness struggle through this line of questioning. The natural tendency during trial is for the witness to first look to his attorney as if to say, "What do I do?" (Witnesses get confused because they think, "Wait a

minute, conversations with my attorney are confidential. You can't ask me that!") The attorney will typically nod her head, indication that it is okay to answer, but by that time the witness is completely rattled and the jury begins to think he has something to hide. Make sure he is prepared for those questions and that he knows, just like the rest of his testimony, he should just answer honestly. There is nothing unethical about preparing a witness to testify. In fact, to the contrary, it is unethical to let a witness who is not prepared take the stand. Discuss this issue with the witness so he can answer honestly with confidence.

One of the most common arguments I hear in favor of skipping practice sessions is that the witness will sound too scripted. It is true – jurors are suspicious of testimony that appears rehearsed. However, that appearance is not generally a product of what happens during a practice session. It is what occurs afterwards that is problematic. Typically a witness will go home after a practice session and begin thinking about all of the questions that were asked. He will realize how important it is that he does not leave anything out during certain questions so he will make a list of all the important details to remember. For some witnesses that list will eventually become a speech that will be recited over and over. Therefore, the reason a witness appears scripted is because, well, he *is* scripted. The key is to instruct your witness to resist the urge to write out his answers. Inform your witness that you will have your notes during the testimony and if the witness forgets to mention something, you will ask a follow-up question. This takes the pressure off the witness and prevents his desire to write out his answers. Witnesses who write out their thoughts tend to sound like bad actors in a low-budget play.

Anytime a witness becomes scripted during a practice session it is the attorney's fault, not the witness's fault. To prevent your witness from becoming scripted during the practice session it is important that you not ask the same questions in the same order over and over. Most questions can be phrased in different ways and the order of the questions can be altered to prevent the witness from anticipating questions. For a witness who is anticipating questions in a certain order the natural tendency is to begin answering more than the current question. To the outside observer (e.g., the jury) the witness's answers do not make sense. To make matters worse, if you are forced to omit certain questions during trial (e.g., the judge sustains an objection by opposing counsel) the deviation may cause the witness to become rattled. Finally, you can not script the cross examination. Therefore, the witness's behavior will change drastically from direct to cross examination. Juries notice those changes and they do not like it. It is much better to get the witness in the habit of focusing entirely on the current question. He should forget the prior question and try not to anticipate the next question. In short, your witness should answer every question as if it is the only question that will be asked all day.

Giving the witness a little taste of direct and cross examination prior to the deposition or trial testimony will improve his confidence and enhance his performance. If he feels prepared, he will act accordingly.

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