

Preparing Witnesses for Trial: How to Get Them to Be Their Best

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When to Prepare Witnesses

- Don't wait till the last minute.
- Prepare witnesses sooner rather than later.

Do your Homework

- Develop your case's theme.
 - Interview the key witnesses.
 - Review all deposition transcripts and witness statements.
 - Review all germane documents.
 - Thoroughly vet the prospective themes with your client.
- Prepare no witnesses until after your theme is developed.

Have Prospective Witnesses do Their Homework

- Before meeting with a prospective witness ask her to review all documents that might bear on her testimony.
 - Deposition Transcripts
 - Witness Statements
 - Prior Hearing Testimony
 - Relevant Company Policies
 - Relevant Documents that the Witness Prepared or Read

The Preparation Sessions: Generally

- Aim to have at least two preparation.
- Also try to arrange a visit to the courtroom at which the witness will testify, preferably during a trial before the judge who will preside at your case.
- Be sure that the lawyer who prepares the witness is the lawyer who will handle the witness at trial.

The Initial Preparation Session

- Familiarize the witness with the case's claims, defenses, and themes and how she fits into the presentation.
- Review with the witness the events at issue and the related documents.
- Determine from the witness whether the documentation is complete and ask her to identify anything else that may be germane to the case.
- Identify, and address, any questions or concerns that the witness may have.

Horse Shedding- Direct Examination

- **Constructing a Narrative**
 - Witness conveys material in a chronological or otherwise logical sequence
 - Makes the facts easier for the jury to understand

Horse Shedding- Direct Examination

- **Constructing a Narrative**
 - Makes the witness's testimony convincing
 - Attorney should gauge the extent to which the witness is comfortable speaking for an extended length of time or if you need to ask narrower questions.

Horse Shedding- Direct Examination

- **Trial and Error: Preparing Witness to Testify**
 - Ask and answer the questions with the witness in preparation for the trial.
 - Find weaknesses in the witness's memory of events.
 - Preparation builds the witness's confidence in telling his/her account.

Horse Shedding- Direct Examination

- **Trial and Error: Preparing to Testify**
 - Review the testimony as many times as needed until both you and the witness are comfortable.
 - Review likely questions about all exhibits about which you may ask the witness, including foundation and authentication questions.
 - Don't hesitate to step out of the roles to offer helpful suggestions on how the witness can testify more effectively and allow the witness to raise concerns with you.

Horse Shedding- Direct Examination

- **Ethical Considerations**
 - Do not script the witness's answers.
 - Expressly tell the witness that he/she must testify truthfully

Horse Shedding- Cross Examination

- Try to anticipate, then carefully review with your witness, the issues that your opponent will likely press with her.
- Bring prior inconsistent statements to the witness's attention to prepare for impeachment.
- Build the witness's confidence in his/her memory and the narrative to withstand opposing counsel's attacks
- Condition the witness to answer attacking questions with confidence and precision.

Proper Witness Conduct

- **Dress appropriately**
 - This may include a jacket and tie, for example, or given the context of the case it may be preferable not to dress up to that extent.
 - A uniform for witnesses with certain occupations can have a positive influence.
 - Avoid sloppy appearance.

Proper Witness Conduct

- **Avoiding Unfavorable Habits or Ticks in Speech**
 - Eliminate dangerous common phrases like “I don’t know” which the witness might habitually say off the cuff.
 - Do not give dirty looks, roll eyes, laugh inappropriately, etc.
 - Speak loudly enough for all jurors to hear.
 - Avoid hifalutin language.

Proper Witness Conduct

- **Avoiding Unfavorable Habits or Ticks in Speech**
 - Respond to questions orally; gestures won't be recorded.
 - Speak in short, complete declarative sentences, using your own words.
 - “What’s your name? My name is Jane Smith.”

Proper Witness Conduct

- **Follow the Court's instructions.**
 - Rise and sit when instructed based on the judge entering or leaving the courtroom.
 - Come forward to testify when instructed.
 - Avoid disruptive behavior.
 - Don't laugh or banter in the courtroom, even with your friends.

Proper Witness Conduct

- **Answering Questions**

- **Tell the Truth!!!!**

- Straying from the truth is the surest way for the witness to damage your case, perhaps beyond repair.
- Own up to any mistakes that the witness may have made.
- The witness should understand that not every fact is favorable. But, negative facts can be dealt with in a straightforward manner, so long as the witness owns up to them.

Proper Witness Conduct

- **Answering Questions**

- Carefully listen to the question, and answer only the question asked.
- Let the lawyer ask the question before you answer it.
- If you don't understand a question, ask the lawyer to clarify it for you.
- Once the witness is satisfied that she understands the question, answer it, without volunteering.

Proper Witness Conduct

- **Answering Questions**

- **Mental Lapses**

- It enhances a witness's credibility if she explains a mental lapse.
 - The explanation could be contextual
 - Instead of just saying, I don't know, say, I was not at that meeting, or that was not my area of responsibility at that time, or I was not involved in that decision.
 - The explanation could be temporal
 - That happened years ago, and my memory has faded.
 - I haven't read that document about which you're asking recently.

Proper Witness Conduct

- **Answering Questions**

- Witnesses should testify only about what they know, based on their own observation.
 - If they honestly don't know the answer to a question, the only appropriate answer is "I don't know."
 - This is not the forum for guesswork.

Proper Witness Conduct

- **Answering Questions**
 - Briefly pause after each question.
 - To think before giving an answer.
 - To allow time for counsel's objection.

Proper Witness Conduct

- **Answering Questions**
 - Avoid showing bias.
 - No need to exaggerate.
 - If the point is important, the attorney will do the heavy lifting to drive the point home.
 - Exaggeration can harm the credibility of the witness.

Proper Witness Conduct

- Answering Questions
 - Be Spontaneous
 - The witness should not even try to memorize your questions or her answers.
 - You and the witness will credibility with the jury if they believe that the testimony is rehearsed.
 - Instead, strive to make the witness comfortable enough with the facts that so that you can have a spontaneous conversation about them at the trial

Proper Witness Conduct

- **Answering Questions**
 - Do not act in a hostile manner toward opposing counsel.
 - Do not echo selfishness, jealousy, or other similar negative traits that might lead a jury to view a witness as untrustworthy or otherwise unfavorable.

Proper Witness Conduct

- **Answering Questions**
 - Do not remain in the courtroom following testimony
 - Limit the jury's exposure to the witness to the time he/she is on the stand.
 - Avoid the implication that the witness has a rooting interest in the proceeding

Proper Witness Conduct

- Answering Questions
 - Correct Mistakes
 - If a witness makes a mistake while testifying, she should correct it immediately.
 - A simple, “May I correct something that I said earlier?” is sufficient.
 - If opposing counsel points out an incorrect or inconsistent answer, calmly and honestly explain why you were mistaken.

Proper Witness Conduct

- **During Objections**

- When an attorney objects, the witness should stop speaking and wait for the judge's instructions.
- The witness should listen to the objection and the resulting discussion, because it may give the witness clues about a trap that the opposing counsel may have set.

Proper Witness Conduct

- Responding to Leading Questions
 - It's okay to say that the question can't be answered that way, or that your answer requires an explanation.
 - Witnesses may provide conditional answers to such questions may be helpful: "In some cases yes, in others no." "In this situation no."
 - If the opposing counsel's questions contains inaccuracies, the witness should correct them.
 - If left unchallenged, the jury may assume the inaccuracies to be true.

Demeanor is Important

- Witnesses should behave in a professional and dignified manner.
 - When taking the oath, stand up straight, focus your attention on the person administering the oath, and respond with a clear and confident, “I do.”
 - Avoid name-calling. Let’ the Opposing Party’s Conduct Speak for Itself
 - Be courteous to the judge and to the lawyers, even when being cross examined.
 - Don’t take cross examination personally.