

Preparing a Fact Witness for Trial

By Jonathan I. Handler and Erica Tennyson

After months or even years of discovery, and likely failed settlement negotiations, the time comes for final trial preparation. Even if you are fortunate enough to have the facts and law on your side, you must rely on your witnesses to convey those factual details to the fact finder and tell your client's "story." Most fact witnesses will find the prospect of testifying to be a scary and an unfamiliar experience. No matter how small the case or how sophisticated or experienced the witness, you must not underestimate the importance of properly preparing the witness to testify at trial.

This article highlights the important considerations when preparing a fact witness for trial and offers some practical advice. It will not address expert witnesses, nor will it delve into other trial preparation techniques such as mock juries or simulated trials. Instead, it seeks to explain, in a straightforward manner, how to approach witness preparation to maximize the possibility of success at trial for you and the witness—and, most important, your client.

Preliminary Considerations

Even before scheduling the preparation session, consider what your witness really knows, what you need her to contribute, and how she fits into your larger theory of the case. Among other things, consider the following:

- Why are you calling this witness?
- What facts or documents do you plan to get admitted into evidence through her? No one witness should be expected to "carry all the water." Not only should you avoid giving any one witness more burden than she can handle, but if you try to present too much through one person, you run the risk that the high points of her testimony will be obscured.
- Will the witness do a good job, or at least a sufficient job?
- Do a cost/benefit analysis. Could her testimony, for whatever reason, risk harming your case more than it might help?
- If possible, limit the witness's testimony to the topics on which she is strongest. If she stretches the facts on less important points, it will damage her overall credibility.
- Are you only calling the witness to get a key document into evidence? If so, consider whether there is any other way to admit the document. If not, you may want to limit your direct examination as much as possible to restrict your opponent's ability to substantively cross-examine the witness (but make sure you know the rules in your jurisdiction about the scope of cross-examination).

- Even if a witness does not actually have much to contribute, consider whether the fact finder will want to hear from her. Occasionally, a witness will be so intriguing or integral to the facts that the judge or jury will expect to hear from her and will be disappointed—and hold it against your client—if the witness does not testify.

There are also a number of logistical issues to consider before the first meeting.

Is the conversation privileged? When preparing a witness, you will likely want to share relevant facts as well as your theories of the case and how her testimony fits with those theories. You will obviously want to be more cautious, however, if the meeting is not privileged. Be sure to understand fully your jurisdiction's laws regarding privilege and waiver. For example, if the witness is your client's former employee who was employed during the time period at issue in the case, does the attorney-client privilege apply if you are discussing protected information?

Are there any ethical considerations? Are the witness's interests adverse to your client's interests? Are there any other potential conflicts of interest?

How much do you want to reveal? What "big picture" items will you share? It is helpful for a witness to have a few "safe harbor" themes to fall back on if she gets tripped up during her testimony or when opposing counsel attacks on cross-examination. As a general rule, however, most witnesses are unable to focus on more than three overarching themes at once.

How much time do you have with the witness? The number of preparation sessions will depend on the amount of time and resources at your disposal. For any important witness, strive for at least two sessions, preferably three, and more if the witness needs it. Make sure the witness blocks off ample time for each meeting so there are no interruptions or competing obligations.

The first meeting should be well in advance of trial. In it, you may want to discuss the case and explain the big issues. You should also discuss the general contours of the anticipated direct testimony of the witness in the initial meeting. Then, in the follow-up session, you can continue practicing the direct examination and role-play the cross-examination. In this second prep session, you may want to "tear down" your witness and then start to build her back up again. In the final prep session, you will both want to stay in role as much as possible and treat the testimony as a "dry run" featuring questioning and answering with minimal interruptions. It is often helpful for this last meeting to be on the eve of trial, even if it must be by telephone rather than in person.

Suitably preparing a witness is a process that cannot be adequately done in one sitting. You cannot rely on your witness's common sense and good judgment. That said, you may not always have the time and resources for multiple trial preparation sessions. If you are limited to one meeting, focus on the substance

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of the testimony and preparing for cross-examination. Try to avoid giving too many pointers or being too critical in the eleventh hour; it is better that an individual be a little quirky or imperfect than that she sound unnatural, self-conscious, or scripted.

Do you want to share your script? Some attorneys are most comfortable writing out every word of their direct examination. Others prefer to simply share with the witness a broad outline of important points so that the testimony seems more conversational than rehearsed. Either way, the witness needs to stick to your general message and not improvise but must also be comfortable if you start to go off-script as the course of trial demands, or if you condense testimony if the judge wants to speed things along. If you provide the witness with an outline, however, remind her not to bring the outline to trial.

Clients or witnesses occasionally filter out information that they deem irrelevant or unimportant or that they feel their attorney does not need to know.

Basic Principles for Preparing a Witness

A persuasive witness is comfortable with and confident in her testimony. She appears friendly, approachable and believable, not mechanical or rehearsed (the ventriloquist effect). This can only be achieved through proper preparation.

Size up the witness. When first meeting with a witness, figure out what motivates her. If she is not a party, find a way to play to her self-interests. For example, a witness may not really care who is awarded damages at the end of trial, but you may be able to appeal to her sense of justice.

Also consider her attitude about testifying. Is she happy to help out, or is she a grudging witness? Is she a current or former employee of your client? Does she have an ax to grind? Beware of the witness who is overly eager to testify. She likely has a story to tell or a score to settle, which may not be in line with your client's interests.

Keep an eye out for odd or particularly bothersome mannerisms. Some witnesses refuse to make eye contact, while others only refuse during particularly difficult questions. It goes without saying that idiosyncratic witnesses can take more time to prepare. If you have the time and resources, or if the witness has a trait or habit that is so distracting that it will detract from her message, then videotaping her practice testimony can be particularly useful.

Remember that even a seemingly strong witness can pose

problems. One type of witness to beware of is the "vain Caesar": someone who is senior enough in a company to assume that she must know the answer to the questions she is asked and who wants to answer, even if she must rely on assumed knowledge ("must have been . . ." or "the policy is . . .") to do so, and even if this assumed knowledge is directly contradicted by the facts. It is important to analyze each person individually to see what makes her tick and what her trouble areas may be.

Listen to what the witness has to say. During the preparation sessions, listening is as important as advising. Your theory of the case may have changed since the last time you had an in-depth conversation with a key witness about the details of the case. What she says, particularly if it changes or contradicts any other facts, may alter your strategy. You may achieve new insight the night before trial, and you must be flexible enough to tailor your presentation and witness preparation accordingly. It is far better to deal with any discrepancies during preparation rather than at trial.

In the same vein, make sure your witness has told you the whole story. Clients or witnesses occasionally filter out information that they deem irrelevant or unimportant or that they feel their attorney does not need to know. You cannot effectively represent your client as a witness if she is not frank and forthcoming. It is important to explore these topics during preparation so that you can properly evaluate and make your own determinations before trial.

Listening to the witness also allows you to appraise her and assess how her testimony fits in with your theories of the case and with the other witnesses.

Establish rapport. It is very important to develop a relationship with the witness and earn her trust. Your examination will be much smoother and more successful if you are comfortable with one another. If the witness is a third party, she will also be more invested in helping your case—and in remaining available if the trial schedule changes or her testimony is postponed.

Like any other relationship, you cannot assume that a witness will automatically trust you; you must earn that trust. Tell the witness that your most important task is to protect her credibility, since the fact finder must be convinced that what she says is true. If she tries to stretch the truth during practice, push back. In order to constructively criticize a witness, she must trust you enough to listen to you and defer to your judgment.

Educate the witness. Inform your witness to the extent necessary about the case. The witness should also be shown all documents bearing her name or signature (including responses to interrogatories and requests for admissions), any important exhibits, her deposition testimony, and important pleadings. The witness should not be surprised during direct examination. While the cross-examination is not in your control, you can show her the potentially relevant documents and exhibits to minimize the likelihood of surprise. An inexperienced witness can quickly fall apart when unexpectedly confronted with contradictory former statements made either by her or on her behalf.

Consider whether the witness should review the deposition testimony of other witnesses. Doing so is time-consuming and, more importantly, may compromise her memory of the facts. Additionally, bear in mind that such a review could become a

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basis for cross-examination. Regardless, point out major differences in testimony and any problems or issues that must be addressed.

Tell the witness what to expect. No matter how sophisticated your witness, courthouses are unfamiliar and scary places for most people. To the extent a witness has any preconception of what happens at a trial, it is frequently based on what she has seen on television. As a result, you must familiarize your witness with the (real) trial process. Tell her the order in which trial events will occur, where she should sit, where you will stand, when to arrive, where to park, what to bring, and what to wear. (Be specific. Do not tell a witness to wear her "Sunday best" unless you specify "no floppy hats." Likewise, do not tell a witness to buy a suit if she does not own one as it would seem contrived if she wore one to trial.)

Tell her that opposing counsel can call her adversely or out-of-order. Remind your witness not to talk about the case from the minute she leaves her house in the morning until the time she returns, since she never knows who is standing in front of her in the elevator or in line at the supermarket. It is part of your job to make the process of testifying less frightening for your witness by making it more familiar.

Give the witness some guidelines. At your initial preparation session, you may want to give your witness a basic set of rules to govern her testimony. Many of these overlap with those you may have covered when preparing her for deposition, with some important distinctions. Here are some guidelines you may give your witness:

- Remember that this is not a conversation. You must get used to the unnatural process of communicating in a question-and-answer format.
- Take your time. Listen to the question. Do not answer a question you do not understand.
- Think before you speak. Remember that you are creating a record.
- Always tell the truth.
- Try your best, but do not try to reach for memories or facts that you do not have. If you do not remember, say so. It is a lot more honest to admit that you do not recall or remember than it is to guess or stretch the truth. Be aware, however, that fact finders will be unhappy if an important witness who really ought to remember a key fact claims she cannot recall.
- Do not be overly self-conscious, but do not let down your guard.
- Be polite, but do not try to be charming or play games on the stand.
- Avoid absolutes. If you say that you "always" do something, opposing counsel may confront you with testimony or facts contradicting that statement.

- Do not mindlessly adopt opposing counsel's summaries of your prior testimony.
- Keep it simple. Like depositions, do not over-answer a question or volunteer too much information to opposing counsel – but remember that this is the time for you to affirmatively tell your story to the judge or jury.

Practice, practice, practice. Particularly after your initial preparation session, make the witness practice her testimony. Stay in role as much as possible. She will only learn by doing the work, so avoid the temptation to correct her every time she stumbles.

As with any constructive criticism, praise what she does well. After you establish a relationship, you must point out her weaknesses, but be careful not to break down your witness without building her back up.

Anticipate problems. Not only will you want to inform your witness to the extent necessary about the facts and themes of your case, but you also must adequately prepare her for the unexpected. Work through the issues and the weaknesses, anticipate how she will be attacked on cross-examination, and discuss how she should respond. If you are familiar with your opposing counsel's style, try to imitate it when you practice the cross-examination.

It is often a good idea to get another attorney involved in the preparation session if you can. This not only provides a second opinion but also gets the witness accustomed to different examination styles. It can also be useful to have another attorney rehearse the cross-examination, even if she only has the most basic understanding of the case.

Time is limited and you must focus on what is important, but do not ever let your witness think you have let her down by not adequately preparing her. The best witnesses are those who, in retrospect, report that they were very well prepared by counsel.

Remember that everyone must be sincere. Most witnesses can be taught, but you will not be able to change who she is. Her personality will come out. If it does not, the testimony will seem artificial. Work with what you are given.

Help your witness with what she needs to know and help her marshal the facts, but do not ask her to reach beyond where the facts or her memory allow her to go.

Do not play-act. Feigned surprise, by either the witness or the lawyer, looks hokey and subjects the witness to attack on cross-examination. Get the witness to focus her testimony on the facts.

Finally, you must know when to stop preparing. There is a fine line between fully preparing a nervous witness and over-preparing a witness so that she comes across as coached. If your witness follows these guidelines, she should become familiar enough with the process that she can honestly and sincerely tell her story despite the unnatural environment and can confidently handle the unexpected aspects of trial. Of course, having the facts and the law on your side also helps.