Witness preparation can be one of the most challenging, if not frustrating, components of trial preparation. As attorneys, we spend hours upon hours to prepare our case, including witness interviews, document collection and review, discovery, and legal research. When it comes time for our clients and key witnesses to tell their story, however, we are often at the mercy of their recollection and communication skills, no matter how well we have prepared our case.

From the witness’s perspective, the prospect of testifying can even be more anxiety producing. Most witnesses have never testified in a court proceeding and have no life experiences remotely similar to assuming the stand at trial. Ultimately the elements of chance and real-time flubs can never really be removed from the testimonial components of trying a case. Despite these challenges, targeted and strategic preparation can minimize risk and maximize a witness’s ability to testify effectively at trial. This article will offer helpful tips and best practices for successfully preparing your witnesses for trial.

**Identifying and Choosing Witnesses**

Perhaps one of the most important aspects of witness preparation is simply identifying witnesses for trial. Significant strategic thought is required. The fact that a person has knowledge of material events surrounding a claim or defense does not necessarily mean that he should be a witness at trial. To identify and evaluate a potential witness, you must consider questions such as: What is it I need this witness to say? What element of a claim or defense is this witness providing or refuting? Is this witness providing new or cumulative information? Is this witness necessary for the introduction of key evidence?

After considering the substance of the anticipated testimony, you then need to consider whether the witness has the ability to communicate effectively to a fact finder. In this respect, a potential witness may present certain risks that outweigh their utility. You should consider: How will this witness hold up on cross-examination? What background or baggage does this witness bring that could affect not only her credibility but your case as a whole? How will this witness be viewed by a typical jury? In summary, you should engage in a careful risk-benefit analysis to identify and select a witness. Individuals who present more risk than potential benefit rarely make effective witnesses at trial. Here, the adage that “less is more” is one to live by.

In certain circumstances, we do not have the luxury of a choice and we may be forced to call a witness who presents considerable risk. In addition to certain preparation methods we offer herein, you should seek to narrow and focus a problematic witness’s testimony as much as possible.

**Preparation**

When it comes to preparation, we tend to focus on our witnesses instead of ourselves. In fact, one of the keys to successful witness preparation is _attorney preparation_. Before you meet with a witness, you should know your case inside and out and be familiar with all of the documents you believe the witness may be shown during his testimony. Always draft an outline of both the evidentiary issues that you want your witness to be able to testify to, as well as the difficult questions your witness is likely to confront on cross-examination. A skilled trial lawyer should be able to anticipate the major issues that will come up in the cross-examination of her witness.

There should be no surprises if you have prepared your witness effectively.

Aside from the substantive preparation for your meeting with the witness, you also need to make sure you are familiar with the local customs and practices of the courtroom where the trial will be held. Does the judge have certain practices that may bear on the presentation of testimony? How is the courtroom configured? Where is the witness box situated in relation to the jury? Ideally, you will want your witness to see the courtroom before he testifies. If this is not possible, you will want to provide your witness with a physical description of the courtroom, how it is laid out, where counsel will stand when questioning, and other details. To attorneys, this information may seem insignificant. However, to lay witnesses with little to no experience with adversarial proceedings, this information will help to de-mystify the process and build a level of comfort and confidence essential to presenting effective testimony.

**Practicalities of Meeting the Witness**

Thorough preparation of a witness generally cannot take place in one day. Further, a witness’s attention span will only last for a few hours, if that, and she will need time to digest the information she will be given. Neither should witness preparation occur too close to the time of testimony. You do not want to meet your witness and discover a glaring potential issue with his testimony and then not have sufficient time to rectify the situation. Accordingly, try to meet with your witnesses as early and as often as possible, particularly if they will be important to your case. This is not always feasible, but it could save you a lot of headaches in the end.

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In the event you have to meet with a witness shortly before the time for his testimony, do not overwhelm the witness with information. Simply give the witness a basic outline of the essential information he will be asked, and provide him with basic tips for responding to questions on cross-examination. The last thing you want is an anxious or flustered witness, and it is better that he messes up on the small details rather than appear uncomfortable or insincere overall.

If possible, try to meet with your witness away from her workplace or home, such as in your offices or at a neutral location. You will need your witness's undivided attention, and if the witness is in a location where coworkers can stop in, phones ring or distractions will occur with any frequency, your preparation session will be significantly compromised.

What to Tell the Witness

When you meet with a witness, be sure to start with an overview of what she should expect in the courtroom. She should be familiar with the procedures of giving testimony, which will increase her comfort when the day of her testimony arrives. Go over all of the key points of the substantive information she will be asked to testify to during direct examination. Educate the witness on what she does not recall, and make sure she understands what key points you will be seeking to establish with her testimony. Go over any negative points or counterarguments you think opposing counsel will pursue during cross-examination. Again, there should be no real surprises when your witness takes the stand.

Role-playing can be uniquely effective in this regard. Run through the witness's direct testimony and practice crossing her on sensitive issues in the case. Finally, during this process, assess her performance. Consider whether she has any nervous habits, patterns of speech, or expressions that may not be well-received by a jury or judge. Coach her on these issues if you believe they will be problematic, but be cautious not to make the witness too anxious over natural mannerisms that may be impractical to change.

Key Pointers for the Witness:

- Tell the Truth – No matter what, always instruct your witness that he or she must honestly answer each question that is asked.
- Pause Before Answering – Caution the witness that speed is his enemy. He should take all of the time he needs to respond to questions, and he should never respond to an attorney's urging him to answer before he is ready. Mention that you may object to a question after it is answered, and in that case they should wait until the objection is resolved before answering.
- Do Not Answer a Question You Do Not Understand – Make sure the witness knows that it is completely acceptable to ask for clarification of a question. In no circumstances should the witness allow herself to feel compelled to answer a question she does not understand.
- Do Not Speculate – Explain that saying “I don’t know” is perfectly acceptable, and is in fact preferred when the witness lacks the knowledge to respond.
- Be Comfortable – A bit of nervousness is to be expected, but an overly stressed witness will not present well to a judge or jury.
- Do Not Volunteer Information – On cross, the witness should only answer what is asked, and should not answer with long narratives or otherwise volunteer information.
- Be Nice – This is basic advice, but politeness is often forgotten when the witness is being cross-examined on the stand, especially when it is his case at issue. Juries and judges hate a rude witness, or a witness that tries to play games with the attorney. The witness must be prepared to “take the high road” and be professional and polite throughout his testimony.
- Damper Emotions – Following the direction to “be nice,” the witness should be cautioned not to get too emotional during testimony. This is a difficult proposition considering that testimony may be the only chance the witness has to tell his story in the case. At the same time, heightened emotions can make the witness seem overly defensive, nonsensical, or unreliable. It is best to stay calm in order to effectively deliver testimony.

Document Issues

Some attorneys may want to share a lot of documents with their witnesses, and even provide them with an outline of the testimony that they want them to provide. This, however, puts your work product in danger as the witness may be asked extensively about what he reviewed in preparation for testimony. Only show your witness documents that were produced in discovery, or, better yet, only exhibits that will be submitted in court. Your witness will likely not remember or review documents you give them to study independently anyways, so it is best to rely on the conversations you have with them for substantive preparation.

Ethics Questions

Finally, be prepared for ethical issues that may arise in the course of witness preparation. Rule of Professional Conduct 3.4 prohibits “assist[ing] a witness to testify falsely.” See also RPC 1.2 (a lawyer shall not counsel a client to engage in criminal or fraudulent behavior). Similarly, RPC 3.3 (“Candor Towards the Tribunal”) applies to witnesses you have prepared, not just the attorneys themselves. If you know a witness has of...
Through the Court’s Eyes: Judicial Perspectives on the Pretrial Process

by Gemma Zanowski

Working for the past two years as the judicial law clerk to four of the eight superior court judges in Kitsap County has without a doubt made me a better lawyer. The mentoring I have received from the judges as well as my observations of and interactions with experienced attorneys have impressed upon me numerous practical lessons. In this article I discuss what I consider to be the most valuable information on courtroom pretrial practice I have learned during my tenure.

Lay the right foundation

**Know the applicable state and local court rules.** It is often apparent that an attorney has not cracked a copy of the court rules—local court rules in particular—before filing a motion. While court rules vary by jurisdiction, and learning them cuts into a lawyer’s already scant time, disregard of local practices and procedures is unsound lawyering. Missing a deadline set by a local court rule can cause delay or prevent the court from considering a pretrial issue. On a multi-judge bench with rotating calendar assignments, attorneys will encounter both judges who rigidly adhere to court rules and judges who take a more flexible approach. Attorneys should assume judges are all sticklers and save themselves a heart attack.

**Timely provide bench copies of your pleadings.** Some judges will not consider a matter if bench copies have not been provided. Some judges will call an attorney out in court if she did not provide bench copies. And even if a judge does neither of the above, attorneys should consider bench copies an indispensable component of motions practice. Judges read bench copies. A bench copy is the medium through which a judge educates herself on a pending matter. Judges highlight and write questions and thoughts on the copies and tab what they consider to be critical issues or irreconcilable weaknesses—issues an attorney then may have the opportunity to address in oral argument.

Bench copies should provide all the materials the attorney wishes the judge to consider for the motion under consideration. It may not be apparent in the record to which document an attorney is referring. If these documents are not benched, the judge wastes time fishing around for them (best-case scenario) or misses or disregards the document altogether (worst-case scenario).

**Write professional briefs.** Assume all judges want to make legally sound rulings. It is an attorney's job to fully prepare the judge to rule on the issues in her motion—if the motion was important enough to bring in the first place, it is important enough to prepare thoroughly. Ask: What information can I provide the judge to ensure she makes a sound ruling? Then provide that information in a clear and concise manner. Note that while an attorney may be an expert in a legal area, the judge may not. Give legal context when necessary. The same goes for any scheduled oral argument.

Never cite a case you did not read completely. Attorneys with busy schedules and pressure from clients, partners, and impending deadlines may be tempted to cut corners by skimming only what they consider to be the meat of the case they are citing, or by failing to read the case at all. By doing this, an attorney runs the risk of missing important details that may help his case. Or of missing an opportunity to reconcile factors that distinguish the case from his own. Or of missing the fact that the authority is contrary to, rather than supportive of, his seminal point. Judges read cases cited in briefs. Motions have been won and lost on this point.

**Cite check and edit briefs.** If the judge cannot find a case cited because the attorney failed to cite to it correctly, the

Witness Preparation: What to Do, What Not to Do, and Best Practices from previous page

Ferred false information in court, you may have an obligation to notify the court.

Also, be on the lookout for potential conflicts of interest that may arise between the witness, your client, or other parties. This may be a concern particularly in the area of corporate witnesses. If your client is the corporation, and you are preparing an unrepresented employee, that employee should be advised that you are not her attorney.

**Final Notes**

In general, preparing a witness for trial testimony can be a challenging proposition, but it does not have to be a daunting one if you are well prepared and understand the limitations of what can be accomplished. Above all, you cannot (and should not) control the witness on the stand, and trying to obtain that sort of assurance of witness performance is a lost cause. Simply provide the witness with the information she needs to testify as clearly, effectively and painlessly as possible. If that approach is taken, your witnesses will deliver effectively testimony at trial and be very grateful she had the chance to work with you.

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I, Stacy Holmes, Washington State Bar Association Section Leaders Liaison, and with permission from the authors, do hereby authorize Dorsey & Whitney LLP to reprint the article “Witness Preparation: What to Do, What Not to Do, and Best Practices,” by Jessica Andrade and Lisa M. Marchese, which appeared in the Fall 2013 issue of the Washington State Bar Litigation Section Newsletter to be published on the Dorsey & Whitney LLP website.