

How To Prepare Witnesses To Make (Not Break) Your Case

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Many witnesses are very nervous about testifying, and they may be asked to testify about details of events that occurred years earlier. Adding to the challenge is the fact that trial is notoriously unpredictable.

Here are 10 battle-proven strategies for getting your witnesses truly ready to present your side of the story to the jury, no matter what arises in the courtroom.

1. Get Ready Early (But Not Too Early). As soon as you get your trial date, reach out to the witnesses that you will, or may, call at trial. Let them know when and where the trial will take place, whether to expect a subpoena, and your best estimate of when you will need them.

Exchange contact information and arrange to send them a copy of their deposition transcript (if any) to refresh their memory about the case. But be wary of scheduling your witness preparation sessions too early, since you want the session to be fresh in the witness' memory when she is called to testify.

2. Prepare Outlines, Not Scripts. Before you meet with your witness to prepare, it is essential to have an outline of what you expect to ask in direct examination, the key points you need to elicit from the witness, and which exhibits you will enter through that witness.

You should also have an outline of what you expect opposing counsel to ask. The operative word is "outline." Do not get stuck in a rigid question-and-answer script.

At trial, it is important to really listen to the witness' answer and to adapt your questions in real time. You may need to work around a court ruling on an objection or motion in limine. You may want to strike whole sections of the questioning if you feel that other witnesses have covered the material.

Having a general outline allows you to keep track of what you need to accomplish with a witness without feeling tied to an inflexible script.

3. Enlist Witnesses in Shaping the Larger Narrative. While each witness will testify to a piece of the overall facts, actively enlist the witness in shaping the larger narrative that you will present to the jury.

For example, you might read your draft opening statement to the witness, to give them a sense of the case themes and provide them with an opportunity to correct or fine-tune any points. Not only does this step help the witness see how her testimony fits into the larger case themes, but she may raise questions or identify issues you had not considered.

4. Practice Direct Examination. The process of testifying in court is foreign to most witnesses, and positively terrifying for some. Practicing direct examination is critical to a polished presentation. The goal is to make the witness comfortable with the give and take of direct

examination and the topics that you expect to cover in your examination. This practice can eliminate a lot of fears and get the witness on solid footing.

For example, in one direct examination practice, a witness confessed, with some embarrassment, that she did not know the meaning of a word that we were using repeatedly in the examination. We were then able to explain its meaning, and pivot to using more accessible language that she (and the jury) would readily understand.

5. But Do Not Practice Too Much. The goal of preparation is not to have the witness memorize a specific set of questions and answers. Rather, the witness needs to testify truthfully, in her own words, from her own memory, in a way that is organic and authentic to her in the moment. Too many preparation sessions can make even the most earnest witness sound overly rehearsed and disingenuous.

6. Practice a Realistically Unpleasant Cross-Examination. Being subjected to cross-examination is a withering experience for any witness, no matter how sophisticated or thick-skinned. It is crucial to practice so that the witness gets a real feel for what the process is like.

Have someone on your team — preferably someone other than the person who will handle the direct — role-play the cross-examiner. Based on what you know from watching opposing counsel in previous trials or depositions, adopt the cross-examiner's courtroom style.

If you expect the cross-examiner to yell, get in the witness' face or use scathing sarcasm, do that in the practice. A witness who is not ready for the realities of cross-examination may react badly at trial.

Practice how the witness can assert herself when opposing counsel is demanding a yes-or-no answer to a question that simply cannot be answered as "yes" or "no." Practice how the witness can correct any wrong assumptions by the cross-examiner.

Prepare the witness for opposing counsel's trial theories. The witness needs to know the topics that opposing counsel will cover, the points she will try to score and the deposition testimony she will seize on to minimize surprises at trial.

7. Listen to What Will Make the Witness Comfortable. Ask witnesses if there is anything at all that they are worried about, and you may be surprised what you hear. You may learn about substantive issues that need to be vetted before trial.

A witness may be worried about how to explain a particular action she took, or be concerned about a document; once you know that, you can spend time working through the issues. Sometimes, the aspect of trial that scares the witness the most has nothing to do with the substance of her testimony.

In one case, we found that a witness who lived in a rural area was terrified to drive into the big city to get to the courthouse; arranging for a ride for her was all it took to make her comfortable.

A witness with a bad back told us she feared that she would be unable to sit in the witness stand for hours at a time, so we arranged in advance with the judge for discreet periodic breaks. A witness must be comfortable to be successful.

8. Help a Witness Overcome a Poor Presentation. When a witness performs poorly in the preparation, take a deep breath and consider these tried-and-true strategies. First, schedule additional practice. Some witnesses just need to feel more comfortable with the process.

For example, a witness who defaults into knee-jerk agreement with opposing counsel on cross-examination may need practice asserting herself. A witness who struggles to remember the timeline of events may need extra time to review the exhibits.

If the issue is body language, such as fidgeting or lack of eye contact, consider videotaping the witness' practice testimony and playing it back, so that she can see the issue and correct the problem. If the witness is significant and your budget allows, consider working with a presentation-skills expert who can provide additional coaching in this area.

If the witness is still a problem after taking these steps, you may consider cutting back her testimony to the bare minimum. With a wild-card witness, shorter is nearly always better.

9. Prepare for the Optics. Without any direction, a witness unaccustomed to business attire may appear at trial in sweatpants, and a corporate executive may come in a Gucci suit. Neither is the look you want.

Tell witnesses who are not used to corporate attire to wear what they would wear to church. Tell corporate executives to leave the designer suits and handbags at home, and wear understated clothes that will not intimidate a jury. The best look is conservative, professional and accessible.

10. Keep the Lines of Communication Open. Check in with your witnesses often in the weeks before trial. They will appreciate periodic updates on often-changing trial schedules, and you will benefit from staying abreast of their scheduling issues that could impact the trial, such as business travel, vacation plans or medical appointments.

But staying in touch can have substantive benefits as well. For example, the witness may alert you to new facts that impact the trial, may have received a call from opposing counsel, or may have heard about who is planning to testify for the opposing party. Have a member of the trial team reach out to witnesses periodically, and make sure they know how to contact you 24/7.

It is important to develop a relationship of trust with witnesses early on in the process. An open dialogue with witnesses about the facts of the case, and themes of concern, will ensure that you minimize surprise at trial. Solid preparation will put everyone at ease and ensure that the jury really hears your client's side of the story from the witnesses who know it best.

--By Dawn R. Solowey and Lynn A. Kappelman, Seyfarth Shaw LLP

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