



Preparing Your Witness To Be A Performer

Law360, New York (February 08, 2013, 1:24 PM ET) -- A trial is a performance. The courtroom is our stage, we, as attorneys, are the directors, and the jury is our audience. How then do we prepare a witness, a layperson having no training in the art of litigation, to give an effective and memorable performance? This article highlights important tips to keep in mind as you prepare your witness to testify at a deposition or trial.

Preparing Your Witness to Testify at a Deposition.

Schedule an in-person deposition preparation session with your witness. Your primary focus during this meeting should be getting to know your witness, while creating a comfortable environment for him to disclose as much information about himself and the case. The more you know, the better equipped you will be to develop the case storyline and control certain aspects of your witness' deposition testimony. Below are some points to address during the deposition preparation session:

Get to know the bad, the very bad, and the ugly. Chances are you already know the good and great facts of your case, so use the deposition preparation session to become familiar with the weak points of your witness' testimony. Your witness should understand that the attorney will be allowed to ask him, just about, anything at the deposition, but this does not mean all questions and answers will be admissible at trial.

Experience matters. Ask your witness about his prior deposition experience to learn: 1) his level of comfort with the deposition process; and 2) his involvement in other lawsuits, which may be used to impeach him at trial. For someone new to the deposition experience, it is important to explain who will be in attendance, their individual roles, and the purpose of the deposition. For an experienced deponent, find out the nature and circumstances surrounding his prior depositions. This is also a good time to determine your witness' criminal history and verify which convictions he may be required, by law, to divulge.

"I do not know" may be the only right answer. While a deposition transcript full of "I do not know" may cast your witness in a negative light, under some circumstances, "I do not know" is the precise answer. Most witnesses feel obligated to deliver descriptive answers and lengthy explanations, merely because they are in the hot seat. Many witnesses tend to believe that because they have some involvement in the case and have been called upon to answer questions, then surely they must have all the answers. Remind your witness he is not expected to know everything. If he truly does not know an answer, then the only correct answer is "I do not know." This not only maintains your witnesses' integrity throughout the deposition, but also pressures the questioning attorney to follow-up or move on to a different line of questioning.

Do you have the time? Direct your witness to answer only the exact question asked of him. A colleague once showed me a great way to ensure your witness fully understands this simple direction. Once you have explained the importance of answering only the specific question posed, ask your witness, "do you have the time?" If he answers with the actual time, "it's 3:05", then he did not understand your direction because the only correct answer is, "yes" or "no".

It's a date. Ensure he knows exactly where the deposition will be held, to be there at least fifteen minutes prior to the start time, and where the most convenient parking is located. Take note of your witness' cellular telephone number or the best phone number to reach him the day of his deposition.

Show some social media restraint. Instruct your witness to refrain from commenting about the case on Facebook, Twitter, Instagram, or his personal blog. In some situations, it may be necessary to instruct your witness to completely deactivate all social media accounts. This is especially necessary when your witnesses' past actions or comments may be used to impeach him. This is an important piece of advice that is relevant throughout the entire pendency of the case and, especially, during trial.

Preparing Your Witness for Cross-Examination.

Whether or not your witness perceives the trial as a performance, he should understand that cross-examination is, without a doubt, a deceptive dance. If your witness is not adequately prepared, the cross examining attorney will surely lead him toward carefully crafted traps. Consider the following points as you prepare your witness for cross-examination at trial.

The Basics. Explain the nature of trials and how the day will likely be long and full of uncertainties. Also explain that a party may "invoke the rule" on sequestration and advise him to bring reading material to keep busy as he waits to testify. Your

witness should know that jurors will be wearing identification badges and that he is not permitted to speak to any member of the jury. Should your witness speak to a juror accidentally, he must know to notify you immediately of the conversation.

Add finesse to his performance. Instruct your witness to always keep his knees positioned toward the jury when he is seated at the stand. This will serve as a reminder to direct his testimony to the jury and not the attorney asking the questions. Instruct him to sit up straight and speak clearly and confidently to the jury. The most effective witnesses exude sincerity.

Presentation is everything. If your witness does not ask you what he should wear to court, you must take the initiative and tell him what is appropriate dress for trial. Depending on the nature of the case, you may want your witness to wear a suit. In some circumstances, it may be better that he wear his employer's uniform. Make sure he knows that most judges will make a witness return home and change, if they show up in: shorts, an athletic jersey, a baseball cap or sneakers.

Temperament. Is your witness easily offended, or likely to fly-off the handle, curse or make racial slurs? If so, instruct him that bad tempers, curse words and hate language have no place in a courtroom. No matter what the questioning attorney does or says to provoke your witness, he must know the importance of remaining calm, providing an appropriate response, and never becoming argumentative. On the other hand, a shy or quiet witness needs to understand the importance of speaking up to ensure that everyone in the courtroom is able to hear him. Attorneys must hear him to make proper objections. The court reporter must hear him to transcribe the record. Most importantly, the jury must hear him to consider the evidence he has to offer and make a determination as to his credibility.

Legal terminology. Take the time to explain the meaning of legal terminology that your witness may hear throughout his testimony at trial. In simple terms, explain that when the judge "overrules" an objection, he can proceed with answering the question. If the judge "sustains" an objection, he must refrain from answering the preceding question and wait for the attorney's next question. It is wise to briefly explain the meaning of "mistrial", such that, your witness understands there are certain facts he is capable of revealing that will draw a mistrial and end the trial.

Turn up the heat. Lastly, cross-examine your witness. Put him to the test and let him feel the pressure and frustration inherent in being lead to give an answer that is unintended, or incomplete. Take a mental note of how he handled cross-examination, without interruption, and deliver rapid-fire questions. Then, teach him how to handle cross-examination better. A majority of the time, it is matter of reminding your witness to refrain from providing a lengthy answer when a

simple and sincere, "yes" or "no", looking straight to the jury would suffice.

The uncertain nature of depositions and trials presents a great challenge to attorneys. The advice contained in this article is by no means all encompassing of the many pitfalls you are sure to encounter alongside your witness.

Nevertheless, these tips, when incorporated into your practice of law, will surely strengthen your witness' presentation at deposition and trial and the overall merits of your case.

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