
Witness Preparation: Hit or Myth?

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Have you ever helped a witness get up to speed, or interviewed a witness who seemed all put together, only to see him or her take the stand and unravel? For example, had Mark Fuhrman been able to appropriately acknowledge his regrettable actions of the past in the O.J. Simpson criminal trial, how many days of courtroom drama would we have been spared?

Recent high-profile cases suggest the need to rethink basic assumptions about witness preparation – to, in effect, probe the essentials of this fine art more deeply than is encouraged in most litigation skills training.

There are two fundamental levels of witness preparation:

- **Level 1:** Surface, which includes observable outward appearance, demeanor, body language, and delivery of verbal testimony.
- **Level 2:** Subsurface, which includes the emotional/personal/professional conflicts that act as an undercurrent to the surface level.

Level 1 – Surface

Many practitioners (lawyers and others) attempt to modify the exterior aspects of witness testimony (i.e., the surface level) by rehearsing the “correct” responses with witnesses, admonishing them about incorrect responses, and telling them how or how not to look (i.e., cosmetic fixes). It is common to discuss the selection of the appropriate suit and tie for a male witness or the right style of

dress and accessories for a female witness.

It is also common to provide witnesses with lawyer-generated outlines or scripted responses for Q & A sessions, and to ask them to study and internalize the scripts. Efforts of this type require witnesses to perceive, attend to, comprehend, store and recall information. In other words, they must use their perceptual and cognitive abilities.

However, traditional witness preparation tends to yield unreliable results because it is superficial and does not address subsurface conflict. For example, we have often heard counsel advise a witness, “Don’t worry about this particular issue in your testimony,” without knowing what the witness actually does have to worry about. Progress made through surface-level preparation alone is transient and highly susceptible to being reversed in the absence of constant reinforcement.

Conflict tends to undermine surface-level preparation because it interferes with the perceptual and cognitive skills involved in processing and recalling the information.

Distractions or emotional concerns may cause the witness to simply forget the answer due to limited recall of

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the “correct” response when under pressure. Second, even when the witness recalls the “correct” response, the delivery can unwittingly communicate unaddressed, underlying discomfort or conflict and betray the intended message. In other words, the delivery (through intonation, choice of words, facial expression, body language, posture and eye contact) can sabotage the response (for example, when the mouth says “no” but the head nods yes).

Finally, since rote feeding of responses cannot predict every possible question, it cannot supply every possible answer. The witness may progressively fail to hold up under attack on cross examination because he or she does not know the prescribed response to an unanticipated question.

If, in the face of the unexpected, a witness senses that they’ve lost control, it will throw them off track and into a tailspin.

Level 2 – Subsurface

The surface-level approach thus ignores two powerful sources of potential witness failure:

1. The inability to predict every possible question and thus to model every possible response for the witness.
2. The fact that, in some way that relates to the case or the experience of testifying, the witness is conflicted. Such conflict tends to undermine surface-level preparation because it interferes with the perceptual and cognitive skills involved in processing and recalling the information necessary for effective witness performance. In addition to pondering and reviewing legal or technical facts, almost

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every witness is likewise preoccupied by internal and personal issues. These may pertain to his or her real or imagined vulnerabilities, may

or may not be case-related, and may be known or unknown to the trial team. Usually they are unknown.

For example, there was “the man who bent over backwards,” a caring, hardworking disaster-claims adjuster

with an impeccable professional record who had an extramarital affair during a claim assignment. The handling of that claim later became the issue of a lawsuit. The adjuster’s diligence might be a positive issue under cross, but because of his affair (not the work he had done) he experienced great angst while preparing to testify. The consequences of being exposed threatened to undermine his testimony. It was only by bringing the issue of his affair to light, discussing possible consequences and solutions, and reconciling them in the context of the case that the witness was able to cope with it.

Once free of his dark secret, he was prepared to assert affirmative points, focus on his proper handling of the disputed claim, and present himself with dignity. In fact, further dialogue revealed that, in some instances, his on-the-road relationship may have actually benefited the insured because he had offered extra assistance to his coworker paramour (crawling into difficult-to-reach inspection sites, for example), which he would not have done had they not been so close.

The sources of conflict are typically not cognitive, but emotional or personal in origin. Since one’s emotional state affects perception and memory as well as overall competence and performance, it is risky to engage in preparing a witness on the surface level until the covert, subsurface-level issues are addressed first and fully. The conflicts must be explored, revealed and resolved before a witness can come to a state of optimal competence and reliable performance in which he or she is fully able to process and handle information.

During typical preparation sessions, witnesses are unlikely to voluntarily bring their personal conflicts and concerns to the surface and reveal them to the trial team, either because they are unaware of the conflicts themselves or because they experience shame, regret, dread of repercussion, or selfrecrimination.

This is particularly so for expert witnesses who often fancy themselves (or believe others should see them) as invincible. Admitting a problem could shatter that image.

The goal is to prepare a witness to be conflict-free. The term “conflict-free” does not mean “problem-free,” in which witnesses would be reassured by simply playing down the challenges to overcome in the testimony. Instead, it means a witness free of unaddressed emotional dread about undisclosed issues.

Internal conflict is fueled by anxiety and is then unwittingly disclosed on the stand in a variety of self-defeating behaviors.

These include defensive preempting of, or sparring with, the cross-examiner; anticipating questions; interrupting the examiner; becoming antagonistic; misstating known facts; failing to recall memorable facts; or contradicting prior testimony.

Solving Conflict: Important Steps

Being conflict-free is achieved by:

1. Establishing rapport and trust with the witness;
2. Empowering the witness with knowledge about the case, the process, procedure, case progress, and expectations; and
3. Exploring and addressing internal personal fears by providing concrete coping strategies and helping to reframe issues.

It is not necessarily a “bad fact” that undermines a witness; rather, it is how the witness views and reacts to the bad fact that determines his or her credibility and durability as a witness. One senior engineer had a habit of jotting down highly provocative and inflammatory comments in the margins of his company’s internal memos. In a lawsuit years later, he was terrified those notations would come back to haunt him.

The day was won by shifting his focus from the notations to his behavior, and by getting him to acknowledge outright that he had a bad habit of writing “cockamamie” things which were immature, impudent, and intended to get a rise out of his superiors, but which did not relate to the plaintiff’s allegations of fraud.

Establish rapport and trust. Ask fundamental questions that show concern for witnesses. Who are they outside the context of the case? What are their family histories and backgrounds? Place in birth order? Role in family, role in business, role in the case? How has all of this affected their personal and professional lives? What makes them angry or worried or upset? What is the best and worst outcome they could expect? How do they feel about the possible consequences? What is their prior experience testifying?

What from that experience still applies? What’s different now? What, if anything, do they regret regarding this case?

How, if at all, can it be remedied? What would they have done differently if they knew then what they know now?

Maximizing contact between the witness and the trial team helps to maintain the established rapport and

sends a message to the witness that the trial team is receptive and values their participation. Individuals such as junior or lower level associates and staff who are capable of building rapport with witnesses can act as communications liaisons between witnesses and senior members of the trial team.

Such liaisons are commonly more accessible and less threatening. Witnesses are apt to ask them questions

or express concerns to them. These contacts can be especially valuable during the pretrial countdown days when what the witness considers important can be superseded by the trial team’s priorities.

Empower the witness with knowledge. Even a seasoned professional can be reassured by a review of fundamentals and details of what is expected in an upcoming procedure (whether deposition, hearing or trial). Make sure witnesses are kept up to date regarding the status of the trial and changes that may impact the order and substance of their testimony. The communications liaisons discussed above can assure that witnesses are continually apprised of developments.

Address areas of conflict and provide coping strategies. Particularly troublesome witnesses who have difficult dispositions, attitudes, and/or substantive problems can be significantly aided with the help of professionals. Appropriate professionals to consult include those who specialize in psychology and law, who have an astute understanding of trial tactics as well as the know-how to deftly elicit and manage witness conflict. Psychologists who lack an understanding of trial context and strategy will be of limited value.

Explore, through nonjudgmental dialogue, how the witness witnesses reframe issues to alleviate undue stress and resolve internal conflict. Perhaps most importantly, do not supply answers before hearing out the witness.

Here are a few specific coping strategies:

Reframe Difficult Issues

From: “I did the wrong thing.”

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To: "Knowing what I knew at the time, I did my best under the circumstances: I made a reasonable choice and took reasonable action. I did not know and could not have known then what I know now."

Overcome Anticipated Criticism or Exposure

From: "I fear this issue is going to come out. I pray it doesn't. I don't know what to say. I should have done a better job/more/shouldn't have done what I did."

To: "That issue may very well come out. If it does, I can respond with x, y and z. It is not really relevant because it has nothing to do with this case. It is simply intended to make me look bad. Knowing that, I can prepare for it. In any case, I can bring the focus back to my main point."

Modify Unrealistic Expectations

From: "I wish I had read everything, knew what everyone else was going to say or said, and could remember everything so I don't get tripped up and look stupid."

To: "No one can read, know or remember everything. I can reasonably review what's important, make a plan and be diligent. After that, it's perfectly fine to ask to see documents to refresh my recollection, to take my time and contemplate questions, and to say I don't know/remember' if that is the case. I do not have to be perfect, I just have to be myself and do my best."

Take Reasonable Control

From: "No one is really looking out for me. The lawyers don't even know the right questions to ask. I'll have to straighten them all out."

To: "I'm part of a relay race. I have my part, no more and no less. My part is a-b-c. If my lawyers choose not to ask for a certain detail, that's based on their expertise. They probably know something I don't, so I'd better do my job and let them do theirs. "I'll just stay

cooperative and answer the questions asked as best I can. If the other lawyer asks a poor question or a mistaken assumption, I will simply offer accurate information and not attack the lawyer. I'll have another chance on redirect to respond if my lawyer thinks it is necessary. If not. I'll have to trust their judgment. They're running the show, not me."

Learn Where to Pick Fights

From: "I'd really like to show up (opposing counsel). He really gets my goat. I'm not going to give him an inch."

To: "I'd rather win the war than the battle. When I respond cooperatively and make my point, I show real strength instead of showing I have something to be afraid of by playing tug-of-war. If I let go of the rope, my opponent will fall, not me. Otherwise, I'll be sending a red flag and creating smoke. That hurts me, not them."

"Conceding minor points is sometimes appropriate. Otherwise, it will seem like I am difficult and combative, which is unpleasant and not persuasive. What really matters in this case is that the jury understands x, y and z. I can help send that message."

How to Not Take It Personally

From: "If I don't blow it on the stand, I'll be a hero; if I do and we lose, it will all be my fault."

To: "I know what I know, I'll prepare well and do my best. My goal is to communicate two points, 'a' and 'b.' Beyond that, I have no control over what happens. I am only one part of the case. I will let the lawyers and other competent witnesses do their part. I will make a sincere effort. Whatever happens, I'll be the same person afterwards as I was before."

In sum: To present a witness who is well-prepared, it is vital to reveal and remove conflicts which, like hidden land mines, can cause irreversible damage.

This article originally appeared in the February 1997 issue of Inside Litigation.