

Under Pressure: Top 10 Strategies to Help Witness Preparation Stick

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Introduction

Effective witness preparation is essential to success in litigation, whether the witness is testifying at a deposition or on the stand at trial. When a witness is not properly prepared to manage the stress of the situation, they can become confused, evasive, forgetful, or combative. Below are 10 strategies for making the lessons learned during witness preparation stick so that the witness performs well under pressure.

1. Invest the time. One of the biggest mistakes that attorneys make is not starting the preparation process far enough in advance of the deposition or trial. Often, attorneys plan to prepare the witness for their testimony by meeting with them only shortly before the witness is scheduled to testify. This is much too late in the process to be effective.

Not only should the preparation start well before the date the witness will give testimony, but, for a key witness, it should be done in multiple sessions. Consider several shorter preparation sessions over multiple days. This gives the witness time to both absorb the various instructions and time to practice employing them. A witness can be overwhelmed by all of the instructions if they are given in one setting, and they are much more likely to be forgotten when the witness is under pressure. Failing to invest the necessary time required for an effective preparation process limits the attorney's ability to prepare the witness effectively.

When deciding how much time to spend with a witness, lawyers need a word of caution about the risks of over-preparing a witness. An "over-prepared" witness gives practiced answers that appear to lack authenticity, and as a result, their credibility suffers. The term "over-prepared" is a bit of a misnomer here, because it is not *excessive* preparation that causes the problem, but a failure to develop the witness's ability to field the questions on their own rather than simply memorizing the answers the lawyers told them they should give. There is a big difference in how the factfinder perceives the answers when they appear to be rehearsed.

2. Assess, Diagnose, and Discuss Problematic Behaviors. Rather than use the same set of instructions for every witness during preparation, it is far more effective for a lawyer to spend time with the witness to assess and diagnose the potentially problematic behaviors of that particular witness. Generally speaking, problems with the credibility or likeability of a witness fall into one of five broad categories: arrogance, agreeability, talkativeness, reluctance, or evasiveness. Focusing on correcting the issues particular to each witness helps the attorney avoid giving counteractive guidance. For example, a reluctant or agreeable witness needs more confidence whereas an arrogant witness needs less. Employing techniques to build confidence can have a negative impact on the testimony of an arrogant witness who already thinks they know everything, but these techniques are *necessary* to improve the testimony of a reluctant witness. Knowing your witness is the key to successfully preparing that witness. There is no-one-size-fits-all technique for preparing every witness in every case.

Openly discussing the witness's problematic behaviors is the first step in correcting the behaviors. Most witnesses are not aware of how they are perceived or why their approach could have a negative impact on their credibility. A talkative witness is just doing what they know; they have no idea that it prolongs their testimony, can dilute the important things they have to say, and can annoy the jury. Similarly, an evasive witness believes they can outsmart opposing

counsel with their clever responses and nit-picking questions. (You know the type--“What do you mean by ‘agreement?’”). It is the lawyer’s job to educate the witness about the behavior and its impact on their credibility.

3. Break bad habits. Breaking a witness’s bad habits comes after assessment, diagnosis, and discussion. Simply telling a witness to stop talking so much or to be more empathetic has virtually no chance of sticking when the witness feels the pressure of the live courtroom or intense cross-examination in a deposition. These behaviors are hard-wired into the witness’s personality, and they need to be rewired through behavior-modification techniques, just like Pavlov’s dog. This is done through consistent application of the pattern interruption process during preparation: each time the witness exhibits the bad habit, the attorney gives a signal, and the witness must start again. According to the dictionary, “pattern interrupt” is a way to alter a person’s mental, emotional, or behavioral state to break a habit. Giving a signal in response to the unwanted behavior interrupts the patterned behavior, alerts the witness that they are doing it, and reminds them to make a conscious effort to change it. Repeating the process enough times teaches the witness to recognize their own bad habits and to replace them with more effective habits.

4. Show the Witness What Effective Testimony Looks Like. The legal process is foreign to most witnesses. They have seen trial testimony on television, but we know that is not how it works in the real world. Lawyers often ask practice questions when preparing the witness, but they rarely stop to demonstrate what effective testimony actually looks like. Showing the witness a question and answer session can reinforce the importance of following the instructions for answering questions effectively: Listen-Pause-Answer. Listen-Pause-Answer. Merely telling the witness to follow these steps is not nearly as effective as showing them what it looks like in practice.

5. Let the Witness Develop Their Skills by Doing. Another mistake that lawyers often make during the preparation process is not allowing the witness to develop the ability to answer questions on their own. During practice sessions, when the witness does not answer the questions the way the lawyers prefer, the lawyers will tell the witness what would have been a better way to answer the question, and then they move on. The witness has not necessarily learned *how* to answer questions based upon that exchange. The witness needs to develop the skill set to field questions they have never heard before, because lawyers cannot anticipate every question that will be asked on cross-examination, and sometimes they have to ask questions on direct or redirect that were not planned. It also needs to be authentic rather than rehearsed. If a witness has not developed the muscle memory of *how* to answer questions effectively, they will not do well when fielding questions under pressure.

6. Practice. This is really a combination of investing the necessary time and letting the witness develop the skill set to answer the questions. It is the key to effective preparation. This requires more than just telling the witness what to say or how to deliver the message. It involves multiple sessions of questions and answers so that the witness becomes comfortable with the pattern of Listen-Pause-Answer, not engaging in bad habits, and providing thoughtful answers in response to questions. There is no substitute for practicing this skill set so that when the witness is under fire, they do not lose their way. The more they exercise this skill, the more likely they are to do well on the stand under pressure.

7. Have Someone Else Do a Mock Cross-Examination. Most lawyers know that a mock cross-examination is important, but they often try to do it themselves. It can be difficult to be as hard on your client as the other side will be. It is usually a better practice to bring someone else into the preparation session to play the role of opposing counsel. Identify the weaknesses in your case – and the witness’s story in particular – and practice how to answer the questions that will come up on cross-examination. Sometimes a lawyer can get too close to the facts and miss the opposing parties’ angle. Getting another lawyer to play devil’s advocate can really help the witness prepare and help the lawyer gain new perspective on what opposing counsel may ask.

8. Use Videotape. This is a powerful tool for changing unwanted behaviors. In preparing witnesses, there is nothing quite as effective as having them watch themselves on film doing exactly what the lawyer told them not to do. This not only drives home the point, but it helps the witness realize how these bad habits can negatively affect their credibility. This is particularly effective for witnesses whose body language tells a story different from the words they are saying. Body language plays a significant role in how a witness is perceived. Turning off the sound and watching the body language can really help identify and correct any disconnect between the witness’s testimony and their behavior.

9. Teach Them Their Purpose. Witnesses do better when they understand their role in the case and why they are being called to testify. This helps them remain focused on what is important and reduces the ability of opposing counsel to rattle them with unexpected or irrelevant questions. If they are asked questions outside of their purpose, they will be more confident in staying in their lane and not allowing opposing counsel to lead them down an unexpected path. If they start to feel lost, they can remind themselves of their purpose and get back on track quickly.

10. Build their confidence. A mistake that lawyers often make is to overwhelm witnesses by giving so many instructions about what to do and what not to do too shortly before the witness testifies so that the witness loses confidence in their ability to testify effectively. The instructions can often seem contradictory (e.g., “Answer only the question asked” vs. “If you need to explain your answer, you should” or “Do not educate the other side,” vs. “if there is a problem with a question, address it before you answer the question.”) These seemingly contradictory and copious instructions can overwhelm witnesses and make them even more nervous than if they had not been prepared at all because they are so afraid they will make a mistake. This is a recipe for disaster. Once you identify their issues, break their bad habits, and develop new and better habits, you should take the time to build up the witness’s confidence. A witness who feels confident and ready going into a deposition or trial is a much better witness.

Conclusion

Following these steps will change the game when it comes to preparing witnesses to testify. It takes time and a lot of practice, but the results are worth the effort. Your witness will be much less likely to revert to bad habits, and instead will be able to deliver answers with confidence. And, as a result, the jury will find their testimony more credible and engaging.