



BASIC OUTLINE TO WITNESS PREPARATION IN THE UNITED STATES

The following is a general outline I give to lawyers in my firm regarding the preparation of witnesses for deposition and/or trial for matters in the United States.

- I. **Preparation for trial involves culling out of what each witness can say those things the witness will say that will prove your case, and preparing each witness to do this persuasively. Witness preparation involves both testimony selection and testimony preparation.**
 - A. Witnesses should be prepared for trial individually by the lawyer who will do the direct examination of that witness. Remind the witness that it is perfectly proper to get together to prepare the witness for testifying at a deposition or trial (and the jury will usually be told this in an instruction).
 - B. Review with the witness everything where the witness is “down on paper.” This includes depositions, other sworn testimony, oral and written statements, interrogatory answers, and any reports the witness made. These are the sources for refreshing recollection on direct examination and impeachment on cross-examination. These should all be in the witness fold that you have already prepared. Have the witness read these, or read them to the witness, if necessary. Point out particularly important areas and any areas where the statements differ from each other. Determine if the witness’ current memory differs from these statements. If so, and the witness insists that his present recollection, not the earlier statement, is accurate, explain that the opposing lawyer may impeach him with the statement and how this is done.
 - C. Review with the witness all exhibits he will identify or authenticate. Explain that you will need to “lay the foundation” for exhibits and show how this is done.
 - D. Review the probable testimony of other witnesses to see if any inconsistencies exist between any of the witnesses. If so, see if there are any explanations for important inconsistencies that can be brought out through the witnesses at trial if opposing counsel makes an issue of them.
 - E. Prepare the direct examination of the witness and review it with the witness – repeatedly. Make sure the witness can actually testify to what you anticipate he can. Make sure he can lay the proper foundation for all necessary exhibits. Once the general outline of the direct examination is clear, go over the actual questions you intend to ask on direct. Above all, practice the actual examination with the witness! Do it in your office. Do it in an empty courtroom. Do it as though the jury were watching. Do it repeatedly until both you and the witness are comfortable with the examination (but stop if the examination begins to sound rehearsed).
 - F. Prepare for the cross-examination of the witness. Review the areas that you anticipate the cross-examination will cover. Have another lawyer conduct practice cross-examinations using the same tone and attitude as the cross-examiner is likely to use at trial. Above all, practice the actual cross-examination with the witness. Talking about the cross-examination can only go so far. The witness needs the experience of actually being cross-examined in a realistic environment.

- G. Prepare the witness for his courtroom appearance. Decide on what he should wear. Jurors expect neat, conservatively dressed witnesses, with clothes appropriate to the witness' background. For most witnesses this means a suit or jacket and tie. For witnesses who wear uniforms, work attire may be effective. Explain how the courtroom is arranged and where the judge, lawyers, court reporter, court clerk, bailiff, and spectators sit. Explain how the witness will enter the courtroom, where and how he will take the oath, where he will sit while giving his testimony, how he should sit and appear while there, and how he will leave the courtroom. If the witness is a party that will sit with you at counsel table, remind him that the jury will be watching and assessing him, even when he is not testifying. Instruct him not to whisper or interrupt you when court is in session. Instead, have him write on a notepad anything he wants to tell you when you are occupied with witness testimony or other critical matters.
- H. Prepare the witness for the procedural and evidentiary rules that govern his testimony. Some lawyers have printed instructions they give each witness.

II. Instructions for Witnesses

- A. Listen carefully to each question. Answer only that question. Do not ramble on or volunteer information. Look at the jury when answering questions. Speak loudly and clearly so that the last juror can hear you easily. Do not look at the judge or at me for help if asked difficult questions.
- B. If you do not understand a question, say so and the lawyer will probably rephrase it. If you do not know an answer to a question, say so. If you do not remember an answer, say, "I don't recall" or "I don't remember." The lawyer may show you your previous statements to jog your memory. If you can only approximate dates, times and distances, give only your best approximations. If you cannot answer a question with "yes" or "no," either the lawyer will ask another question or you will be allowed to explain your answer. Give positive, clear, and direct answers to every question whenever possible.
- C. Use your own vocabulary. Use the words you normally use and feel comfortable with. Don't use someone else's vocabulary, "police talk," or other stilted, artificial speech.
- D. Be serious and polite at all times, do not exaggerate or understate facts. Don't give cute or clever answers. Never argue with the lawyers or judge. The lawyer on cross-examination may attempt to confuse you, have you argue with him, or have you lose your temper. Resist these temptations. Never argue. Never lose your temper.
- E. You will be allowed to testify only to what you personally saw, heard, and did. You generally cannot testify to what others know, or to opinions, conclusions, and speculations.
- F. If an objection is made by either lawyer to any question or answer, stop. (The lawyers will usually stand up when they object.) Wait for the judge to rule. If she overrules the objection, answer the question. If she sustains the objection, simply wait for the next question. Never try to squeeze an answer in when an objection has been made.
- G. Above all, always tell the complete truth according to your best memory of the events and transactions involved.