

**PREPARING WITNESSES:
PRACTICAL AND ETHICAL CONSIDERATIONS¹**

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THE ETHICS OF PREPARING A WITNESS

I. PREPARING A WITNESS FOR DEPOSITION OR TRIAL:

While depositions may be familiar to many lawyers, direct and cross examination of a witness during trial may be less familiar. And understandably, a non-lawyer witness may be downright intimidated by the prospect of testifying at either a deposition or trial. Because of the potential lack of familiarity by both the lawyer and the witness, lawyers have a duty to diligently prepare a witness before a deposition or trial.

The most important thing to remember when preparing a witness is to schedule plenty of time with the witness before the deposition or trial. The preparation session(s) have several different purposes and should not be rushed.

The following should be covered by the lawyer during the preparation session(s) with the witness:

1. Familiarize the witness with the deposition and/or trial process.

If the witness has never been deposed or testified before, this is an especially important task. Don't forget what may seem like minute details such as time and place. If you have an exceptionally nervous witness or a juvenile witness, it may be worth meeting at the courthouse beforehand so that they can see where they will be sitting and where you will be standing when you are asking questions. If it is an important witness, you will want to videotape some of the questioning, and let the witness see how he or she is coming across on camera.

2. Help the witness effectively communicate his or her story.

Whether the witness provides a deposition or testifies at trial, the witness needs to convey in a calm and professional manner what happened that brought about this lawsuit. It is not the lawyer's job to change the witness's story.² However, it is the lawyer's job to help the witness find an effective way to communicate that story. When preparing a witness, start by breaking down the witness's testimony into sections. Begin with introducing the witness (include what is appropriate for your case and situation, i.e., name, address, education, employer, etc.). Then move to discussing how they are affiliated with the suit, and what action they took that involves them in the suit. It is important to go over this part repeatedly. Help the

witness talk about what happened in a way that is easily accessible to someone who does not know anything about the facts underlying the case: if the case involves a highly technical industry, help the witness find ways to talk about the issues in a way that a high school student can understand.

3. Discuss cross examination or questioning by opposing counsel.

Explore with the witness what to expect during questioning. Spend time playing the role of opposing counsel and questioning the witness. Think about whether you have seen opposing counsel in trial or in a deposition before. If you are unsure, ask other attorneys before meeting with the witness to get an idea of the questioning style of opposing counsel. Try to mimic their style when practicing with the witness. It is important for a novice witness to not be surprised by an overly aggressive opposing counsel during deposition and especially in front of a jury at trial. Let the practice session be the opportunity for the witness to experience different styles of questioning. Explain to the witness that there may be objections, and how you would like them to handle those objections. During a deposition, you may want them to wait for your okay before answering after an objection has been made. Rather than trying to explain the difference between "overruled" and "sustained," you may want to tell them to ask the judge whether to answer the question or not.

4. Go over the key documents that will likely be presented to the witness, and discuss the lines of questioning that are likely to arise.

Try to think "outside the box" and imagine unexpected ways that opposing counsel might try to use the documents that have been produced to attack the witness. If preparing the witness for trial, do not forget to prepare the witness for the predicate that must be laid before the document can be admitted into evidence. Make sure the witness understands the purpose of the predicate, and what you are trying to establish.

5. Talk to the witness about how he or she feels about the case and work with the witness to manage those feelings.

Try to get the witness to open up and talk about whether he or she feels responsible for the lawsuit, wishes things had been done differently, or is scared about testifying regarding certain topics. This is the time to be empathetic and supportive. You want the witness to go into the deposition or trial feeling calm and confident. If there are problem areas in the expected testimony (and there usually are), talk about how to frame the answers, and help the witness develop a unifying theme for his or her testimony.

² See below for Section II: Ethical Considerations for Preparing the Witness for Deposition and Trial.

Talking to the witness can also help you better understand and frame your case. This is your opportunity to talk to the people who actually made the decisions in the case. Use this opportunity to better understand exactly what happened in this case and determine whether you are actually prepared for the deposition or trial.

6. Give the Witness Something to Review.

Finally, after a long day of preparation, most witnesses will feel overwhelmed with information. Provide the witness with a one or two page summary of important points to take home. A sample summary is attached as Exhibit A.

The following examples illustrate the principles above:

Scenario #1: A department director had to select someone in her department to be laid off. The employee the director selected was over 40, and the director offered no severance in exchange for a release of claims. The employee sued for age discrimination.

Applying the Witness Preparation Tips: The department director will likely be a key witness for your case in this scenario. When preparing the director for deposition and trial, it will be very important to begin by exploring the department director's feelings and reasoning behind the decision. If the director agonized over the layoff decision and almost laid off a younger employee, talk about her reasoning behind picking the older employee. Counsel the director to take ownership of the decision and clearly articulate the objective factor (seniority with the company, disciplinary history, etc.) that made the difference.

Conversely, if the department director thinks the laid off employee was clearly the worst employee in the department and is offended that the lawsuit was even filed, work on perfecting the tone and presentation of her testimony. Perfect the director's presentation so that there is not a tone of animus toward the employee. Given the director's frustration with the implication of discrimination, make sure that she is prepared to remain calm and professional in demeanor throughout questioning, regardless of the style of cross examination.

Work with the witness on telling her story. Make sure that the director presents the facts calmly and objectively. Make sure the director is prepared to explain clearly why she made the decision that she did, and why the employee's job performance was assessed fairly and objectively.

Scenario #2: An HR director investigated a harassment allegation, but found no support for the allegation. The alleged victim later resigns. Later, the HR director responded to the alleged victim's

unemployment claim and EEOC charge. The alleged victim now files a constructive discharge case, and the HR director is scheduled to be deposed in that case. You represent the HR director's employer, a large corporation, so you disclose your role and counsel the HR director to that effect.³

Applying the Witness Preparation Tips: Given that the HR director rejected the initial complaint and handled the unemployment claim and EEOC charge, it is likely that he is feeling defensive and nervous about this lawsuit. This should be the first issue discussed with the director at the preparation meeting. It will be important to build up the director's confidence in the decisions they made from the outset.

Explain to the HR director that the law does not require a perfect investigation, the investigation will always be attacked by opposing counsel, and questioning about how the investigation was conducted is a routine and common line of questioning. Work with the witness on his demeanor for the deposition. For this kind of a case, videotaping preparation may be a key component to adequately preparing. Filming the HR director's responses to hard questions may allow him to see that he is responding in a defensive or angry manner to the questions. Make sure that the director knows that it is okay to pause and think for a second before answering a question, and that it is okay to ask to take a break if he is losing their cool.

This scenario also stresses the importance of listening to the witness and fully understanding what happened in the case. If after listening to the witness, you come to understand that the investigation was less than ideal, you may need to re-frame your case and the witness's testimony. Again, do not tell the witness to change their testimony. Instead, frame the witness's testimony in a way that suggests that the witness made the best decision with the information available at the time. Tell the witness to avoid speculating as to what he could have done differently and not to get lost in opposing counsel's "if-then" scenarios. Stick to the actual facts at hand.

Again, this scenario shows how witness preparation can have broader implications for your entire case; it may be that the theme of your entire case shifts to being "hindsight is 20/20, but the HR director (and company) made the best decision given the information available." However, you only get the knowledge that you need to shift your trial strategy by engaging in thorough witness preparation in this case.

³ See Tex. Disciplinary Rules Prof'l Conduct R. 1.12.

Also available as part of the eCourse

[Litigation Strategies and Employment Law](#)

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