

# Can We Toss Out the Do's and Don'ts of Witness Preparation?

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Preparing a witness for a jury trial can be one of the difficult challenges of trial preparation for a litigator.

**Compelling testimony from a well-prepared witness can make your case a slam-dunk.** In contrast, an ill-prepared witness can be devastating and totally wreck your chances of success with the jury.

## The Do's and Don'ts

The advice for preparing a witness to take the stand can fill an entire book, and many attorneys will attempt to prepare a witness by giving them a laundry list of do's and don'ts. For example, the attorney may tell them, "Don't try to be humorous," "Don't look at the judge," "Don't play with your hair," "Make sure you button your coat..." and so on. While these types of cautions are obviously valid, they can cause a lay witness who's never been in a courtroom plenty of anxiety and fear of testifying. Attempting to recall all of the rules given to them by counsel can have their heads swimming and ruin their testimony.

This recitation of do's and don'ts may be the traditional method of

witness preparation, but it may not be the best for every witness. Instead, while preparing lay witnesses to testify, attorneys might focus on the story they want the witness to relay to the jury. This means preparing their testimony in light of the witness's ability to communicate and understanding how their story plays a part in the overall strategy.

Listening to a witness and appreciating what they are trying to say can help an attorney effectively prepare them and make them more comfortable with the situation and confident in their presentation.

## Listen and Understand the Witness' Story

Of course, witness preparation includes training the witness to behave a certain way on the stand, but a litigator can also benefit from listening. Attorneys typically like to talk, but many witnesses do not. Attorneys are trained to synthesize information. As a result, they are likely to interrupt witnesses and may be overly anxious

to have them "get to the point" while prepping them. When a witness is speaking, an attorney will focus narrowly on the legal issues or on whether a statement is relevant and admissible. Adopting this approach can leave a witness flustered. Worse yet, it may cause the witness to restrict the information they provide.

As an alternative, a litigator prepping a witness could try a more open-ended approach. This strategy will let the witness feel heard and enable him or her to speak more freely. If the focal point is on developing and learning how to express their narrative, the witness should do more talking than the attorney!

Witness preparation begins with interviewing the witness; but by listening and probing, the testimony may be quite different than its final form. An open-ended interview will allow the litigator to delve into what happened and in what circumstances, along with how the lay witness knows what he or she knows about the issues. The interview should explore the

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relationships between the key players in the case. This exploration should include:

- Their history together;
- Any conflicts;
- Specific motivations and feelings;
- The way in which the witness has dealt with these feelings; and
- The individuals with whom he or she has discussed the issue.

## Create a Context for Their Story

The witness should have a clear sense of how their testimony fits into your case and the objective of the testimony. When an attorney contextualizes the testimony, it can bolster a witness's ability to remember and confidently recall the facts. As part of the listening process in preparing the witness, the attorney should be actively listening and summarizing what the witness says, asking questions to clarify and solidify their narrative.

The more information you glean from the interview, the more substance there is from which to use in their testimony—and the better you will understand your witness, and their storytelling abilities, strengths, and weaknesses. Moreover, emphasizing the important points of the testimony and how it fits into the case can help the witness stay on task and ensure their testimony is not duplicative of other witnesses or detrimental to the case.

When you have fully explored the witness's story, ask the witness to tell it again in five sentences. This succinctness helps the witness and attorney understand the core of the story, and when stated, both have a guide to determine what is relevant. If a piece of information helps explain one of the five sentences, it is important. But if it does not, the jury does not need to hear it.

Telling the story in five points should include these basic elements:

1. A description of the good guys and the bad guys;
2. The beginning, middle, and an end;
3. Motives;
4. Any turning points; and
5. The crisis.

The crisis resolution is frequently the jury's verdict ... so, the witness's testimony must involve the jury in the story. Witnesses should appreciate the important points to defend, as well as the points they can concede—this understanding will enhance their credibility with the jury.

With that in mind, attorneys will tell witnesses to look at the jury



when they speak (that is a "Do"). But witnesses must be relaxed and comfortable with the questions and with their testimony to speak to the jury rather than to the attorney asking the questions. Going through the listening process above will help.

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## Get Them Ready for Cross

While everything may go swimmingly on direct, cross-examination can be another story.

If the witness is lively and attentive during direct examination, but gets stoic on cross, the difference will be noticeable to the jury. It will show a lack of confidence. Moreover, it may undermine the credibility of the witness's testimony. Witnesses must know that they cannot control the cross-examiner's questions; they can only control the content of their answers and the pace of the discourse.

With that in mind, witnesses must listen carefully to the questions and wait until the entire question is asked. Doing so allows the witness to consider the scope of the question and (hopefully) not stray beyond what is asked or volunteer information that wasn't solicited.

## Takeaway

While there is much more to cover when preparing a witness, these ideas will help a litigator to be in sync with the witness and to present the best testimony possible.

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