

Ethical Witness Preparation: How to Make the Witness Own His or Her Testimony (and Keep the Lawyer Out of Trouble)

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A. Initial Contact with Potential Witness

1. Preliminary Requirements

- a. Identify your role and responsibilities. See Rule 4.3 and Rule 1.13(f), 2007 ABA Model Rules of Professional Conduct.
- b. Communicate purpose for initial contact and potential witness's obligations (if any) such as the requirement to be interviewed.
- c. Disclose your understanding of potential witness's role and/or status.
- d. Address any representation (and privilege) issues or concerns. See Rule 4.2, Model Rules.
- e. Emphasize the importance of truthful, complete statements at all times.

2. Assess Potential Witness Through Exploring His or Her Background

- a. Begin to evaluate key testimonial attributes that go to credibility: demeanor, memory, fluency, sincerity.
- b. Explore current feelings about organization, potential subjects or other witnesses.
- c. Look for any significant hurdles: biases, personal agendas, hostility.

3. Begin to Identify the Facts Known to the Potential Witness

- a. Establish the parameters for the nature or type of information that you are seeking through use of broad, open-ended questions.
- b. Clarify early on the important distinction between facts and opinions (and personal knowledge v. hearsay).
- c. Refrain from asking leading questions or expressing your views.
- d. Refresh recollection only after exhaustion of what can be recalled from present-day memory.

4. **Avoid Haste in Cutting to the Chase**
 - a. Recognize need to build rapport.
 - b. Accept and communicate that witness preparation is a multi-step process that only has just begun.
 - c. Lay groundwork for next session with requests, suggestions, and warnings.
5. **Evaluate Overall Need for (and Value of) Potential Witness**

B. Follow-up Contacts

1. **Revisit Prior Session**
 - a. Solicit additions (or changes) from witness re: prior statements.
 - b. Address any issues or complaints.
2. **Begin to Formulate, Organize, and Prioritize Areas of Possible Testimony**
 - a. Prepare basic outline of potential topics and cover them thoroughly with witness.
 - b. Seek to probe, flesh out, corroborate, and challenge (where appropriate) the witness's basic statements.
 - c. Introduce and explore documents and other exhibits at prep sessions.
3. **Narrow and then Focus on Specific Areas of Anticipated Testimony**
 - a. Rehearse direct examination or practice its equivalent.
 - b. Conduct mock cross examination.
 - c. Provide practical tips about preparing to testify and actual testimony.
4. **Emphasize the Importance of Truthful, Honest Responses to All Questions While Under Oath.** See Rule 3.4 (b), Model Rules.

C. Common Challenges, Risks, and Dangers in Witness Preparation

1. **Spending Insufficient Time with the Witness**
 - a. An inadequately prepared witness is a ticking bomb.
 - b. Lawyers typically compensate for lack of prep by trying to control or even direct the upcoming testimony of the witness.

2. Attempting to “Sandpaper” or Help the Witness “Improve” His or Her Testimony

- a. Witnesses are not good at remembering stories that are not their own—it is tough enough recalling their own facts.
- b. Many witnesses will defer to an attorney’s claim of superior knowledge of the facts when alone with the attorney but will revert to their original view under cross-ex.
- c. Some witnesses will want to know what others have said, particularly their immediate superiors—this should not be disclosed (though general assurances may be okay).
- d. Some witnesses will ask to be informed of the company’s position or the company’s view of the facts, particularly in joint defense situations--this too should be avoided.

3. Attempting to Control or Fashion the Testimony of the Witness Can Lead to False Testimony and Dire Consequences

- a. Manufactured or even attorney-influenced testimony exposed during cross-examination will wreck your case.
- b. Judicial sanctions or bar-related discipline are likely if witness points to you as responsible for the false testimony. See Rule 4.1, Model Rules.
- c. Criminal charges for suborning perjury or obstructing justice are possible in flagrant cases. See, e.g., Title 18, U.S. Code, Sections 1503 et seq. and 1623.

D. Three Final Rules for the Road

- a. Never say or suggest something to a witness during his or her preparation that you could not justify to a judge (or a jury).
- b. Treat each witness as you would want opposing counsel to be treating their witnesses.
- c. Ask yourself if you have done everything possible to prepare the witness to testify truthfully and completely.

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