

5 Tips For Preparing Your Witnesses For Battle

By Shannon Henson

Law360, New York (March 05, 2010) -- Prepping your witnesses for trial or a pivotal deposition can be a key opportunity for an attorney to come out in front in high-stakes litigation, but it has to be done right, experts say.

Here are five tips to ensure your witnesses stay cool in the heat of cross-examination:

1. Take your time.

Attorneys don't spend enough time preparing witnesses in this cash-strapped era, when clients are demanding more bang for their bills, said Kathy Kellermann, president of litigation consultancy ComCon.

"Witnesses are not prepped in an hour if they are important witnesses. Especially if they have never been in a courtroom before," she said.

And because time is of the essence to attorneys, they often make mistakes by not sitting their witnesses down "to walk through what is readily obvious to a trained practitioner," said Dan Wolfe, a jury consultant with Kroll Ontrack/TrialGraphix.

If time is running low, attorneys should focus their efforts on select witnesses, Kellermann said. But, remember, your main witness in a case may not need as much attention as a secondary witness who is wary of the process, she added.

"It's the supporting witnesses who can make or break your case as much as the primary witnesses," she said. "It's worth considering: How much help does this person need independent of their role in the case?"

Of course, with some witnesses, no amount of time will improve their performance on the stand, Wolfe said, noting the adage "You can't teach a pig to sing."

"You work with witnesses sometimes, and no matter how hard you try that person is not going to change, and you probably end up annoying the witness. Just give them the tools they need to do the best they can," he said.

2. Don't assume one size fits all.

Many lawyers can slip up by going through a pro forma process with witnesses, asking them a standardized list of questions during preparation, Wolfe said.

"They don't treat individual witnesses as individuals," he said. "They tend to think one size fits all. Lawyers shouldn't [think] that meeting for an hour before a deposition or trial is going to cut it."

A blue collar worker who has never stepped inside a courtroom and a CEO who resents the proceedings will react differently to being on the stand, said Kellermann.

"Every witness has their own issues and needs to be given their own rules," she said.

3. Build a safe harbor.

Kellermann said a lawyer should help a witness prepare a stock response when he doesn't know how to respond to a question on the stand. The safe harbor should be a theme or "core truth" a witness can talk about when stumped for an answer.

A CEO, for example, can return to her work philosophy — such as saying she tried to best serve the shareholders — when struggling for a response to opposing counsel.

The good thing about a safe harbor is that it is based on truths, said David Graeven, the president of Trial Behavior Consulting.

"I wasn't an employee of the company at the time.' Or, 'I relied on the attorney who was advising us on this issue.' They are simple statements based on truths that help reduce anxiety and help a witness handle a tough question," Graeven said.

4. Ready them for a grilling.

Attorneys can be leery of questioning witnesses about a painful subject, such as an accident or losing a loved one, during preparations, said Jeffrey Frederick, the director of jury research services at National Legal Research Group Inc.

"But you've got to go there and find out what is there and how the witness is going to communicate it," Frederick said. "Some lawyers don't want to spoil the spontaneity, and while that may happen, you don't want a witness to spontaneously say something that hurts the case either."

During cross-examination, witnesses may take the questions of opposing counsel personally — especially if the questions are about a time or instance that was difficult for the witness. Frederick said lawyers should make sure their witnesses won't take those questions as an affront.

A lawyer “doesn’t want witnesses to respond to perceived slights by opposing counsel,” Frederick said. Remind a witness not to take what happens on the stand personally, and that it’s the job of the opposing counsel to be tough and get under the skin of a witness, he said.

“That gives them a little bit of distance from opposing counsel,” he added. “It makes it a little bit of a game.”

Reminding your witnesses to speak in their own voices is also key, Graeven said, because jurors will judge a witness not just on what he is saying but on how he’s saying it.

“A truck driver isn’t going to talk about the inclemency of the weather,” he said, adding that jurors will not trust someone on the stand who is not speaking in his or her everyday vernacular.

The credibility of testimony will be especially doubted when a number of witnesses have discussed the case or the incident in question and their language mimics one another’s, Graeven said.

Jurors, Kellermann said, can smell when someone is not being himself.

It’s “more important for a witness to be themselves than what the attorney wants the witness to be,” he said

5. Calm their nerves.

Witnesses will have different concerns and fears going into a deposition or courtroom, consultants said. Some may be nervous about speaking in public. Others may be worried about wearing the wrong outfit or saying something that screws up the case. Identifying those fears and alleviating them is key.

“One of the key objectives is to help the witness be as relaxed as possible,” Wolfe said. “Often the one key reason they fail to perform effectively is that they get nervous.”

Lawyers should help a witness understand the process rather than just telling them what they should say, Wolfe said, adding that witnesses may not even know the basics such as: “Where do I show up? What time do I show up? Where do I park?”

Lawyers don’t realize that not knowing these seemingly trivial details heightens anxiety for witnesses, he said.

The role of a witness, Kellermann said, is wildly different than most people’s day-to-day role. A witness will adopt his own understanding of his role, which may be inaccurate, if an attorney doesn’t explain it to them.

“Make sure they don’t feel helpless. Tell them what to do, not what not to do,” she said.