Powerful Witness Preparation

FAQ's

Witness Preparation

Question: What’s the biggest thing people don’t understand about being a witness.

Answer: They misunderstand who they’re talking to: who the real audience is. After a lifetime of socializing with people, of listening and responding to whoever is talking to them, they assume that they’re having a conversation with the questioner. But this is not a conversation, and in most instances, the real audience is not the questioner: it may be a finder of fact or others, who may not even be in the room. The result is that so much of what we do or say in a normal conversation, so much of how we respond to an audience, is wrong in a witness environment.

Witness Mistakes:

1) “I'll Just Tell My Story.”

Question: My client is a lawyer, and he says he’s used to talking to people, so he doesn’t need to be prepared.

Answer: Tell him he has, “The Curse of the Intelligent Witness.” This is not a conversation. Most of the things that make intelligent people — including many professionals like lawyers and doctors — such good conversationalists, often make them terrible witnesses. It is simply a very different skill set. They talk too much, too fast; they volunteer; they draw inferences and conclusions; they preach, argue, and explain. Mostly, they think out loud; not think first, then speak. It’s an invitation to disaster.

2) “It's too expensive”

Question: How do you go about preparing a witness when it goes against the client's wishes, or the insurer doesn't want to pay for witness preparation of the insured.

Answer: A few points: 1) if you undertake to represent a witness, I believe - and there's some good support - that you've undertaken to prepare him effectively. Otherwise, if it goes badly, the witness may correctly blame both you and the insurer. 2) But it's also the classic "penny wise and pound foolish". A prepared witness is far more likely to do well for the case, to avoid distracting and expensive mistakes and side issues, to give support for a more favorable resolution, and to tell colleagues afterwards how pleased he was with the support the insurer gave him. These - and more - are all sound reasons to invest in real preparation.
Lawyer Mistakes:

1) "I'm Too Busy."

Question: If the client resists doing the preparation, what reasons do you find effective for convincing them to do it?

Answer: Remind them of what they've seen on the news: Gates, Lay, Stewart, Libby, Clinton, Koslowski: a parade of extraordinarily intelligent and successful people who have had disastrous experiences as witnesses. Why is that???

1) This is not a comment on them: being a witness is a very different and unnatural experience. The more intelligent and articulate the person, the worse they are as a witness, because it's so counterintuitive, unnatural, and narrowly focused. 2) Witness preparation is not a distraction: it's an investment. In their past, present and future: Past, to try to address and ultimately bring closure to prior issues; Present, to make this witness experience as manageable and successful as possible; Future, to avoid mistakes or bad testimony, that can lead to future depositions and/or other expensive, time-consuming litigation steps. Unprepared testimony too often is, "the gift that keeps on giving".

Question: As a forensic account with a litigation consulting practice what is the best way to convince counsel that they need to do the kind of, "powerful witness and expert preparation" you had mentioned.

Answer: You're in a tough spot. The easy answer is tell them you won't be as effective a witness if they don't do their jobs and work with you, but you may not have that luxury. Make the push as **cooperative** as possible: "I've testified a lot, and I've found that my testimony is much more effective if the lawyer and I take time to prepare, and to get on the same page substantively." PS. If you do it in an email, you've at least covered yourself, and diplomatically upped the pressure on them to do the right thing.

Question: Any opinions regarding in person preparation vs telephone conference?

Answer: I vote a very strong "NO!" for preparation by telephone. Obviously, circumstances may overcome us, but it's so hard to establish the necessary connection, or get a good understanding of someone's abilities, concerns, issues, knowledge, etc., in person, that I think it's foolish to think we can adequately get all this and more over the phone, and use it to prepare our witnesses over the phone.

2) "Client Is Too Busy"

Question: As a government attorney representing a social service agency daily in court we have little time to prep witnesses. What advice do you have for lawyers who don't have time to establish the bond but want to help agency witnesses testify effectively.

Answer: Tough one. A few thoughts. 1) What about finding a way to do group sessions/presentations/classes on witness prep. Whatever you call it, it's not a substitute for individual prep, but it's a head start. I did that several years ago for a health care company for their facility administrators around the country, and it was a good start. 2) There's a 3-4 page memo I sometimes give to witnesses ahead of time as another heads up. The ABA put it in my
book on a CD (for that matter, you could give out the book, but I don't want to sound like a pitchman). 3) Be creative: everyone's gotta eat, so meals can give extra time (and "breaking bread"). What other opportunities are there?

4) "You never know what they'll ask."

**Question:** How does a lawyer prepare a witness for cross-examination when it's difficult to anticipate what opposing counsel will ask your witness?

**Answer:** Good question. A few thoughts: 1) Use your witness to narrow the gap: push the witness hard on, "What else is there?", "What am I missing?", "What questions are you concerned about?", "If you were opposing counsel, what questions would you ask you?", etc. There will always be some surprises, but we hope to limit them. This process can be a key part of an effective prep. 2) Make sure the witness understands that the rules apply to all issues: in any deposition, there will always be things that we prepare for, but they don't use, and things that we did not prepare for. That's OK. Follow the Rules.

**Preparation: Key Steps**

**General:**

**Question:** How many days prior to the deposition should prep occur? As close to the date as possible, or a few days/weeks to allow for follow-up questions by witness?

**Answer:** The answer to your question about timing is often, "both". Particularly in a complex case with many documents, events, issues, etc., its often good to meet one or more times well in advance, so there is time for follow-up review and questions (for both lawyer and client). However, the basic witness prep must, to every extent possible, be in the days immediately before the testimony, or much of the impact will be lost.

**Question:** Does the preparation time for a witness depend on the type/subject matter of case?

**Answer:** The answer is "yes and no". Yes, because the more complex the case, the more documents, events, issues, etc., the more time is needed. No, because the basic process of helping someone understand the unnatural world of being a witness, including the Rules, the mock, etc., requires an extensive and intensive commitment of time in every case.

**Question:** How do feel about the location of the deposition that is either at the deponent's place of business as opposed to the a lawyer's office or courthouse.

**Answer:** I always push hard to have both the prep and the deposition away from my witness' place of business. Too many distractions, mental and actual, at their workplace.

**Question:** What are your suggestions for preparing witnesses who are not protected by the attorney/client privilege?
**Answer:** I'm spoiled here: as a federal prosecutor for 10 years, I prepared many witnesses of all types, none of whom were my "clients", so no privilege existed. The key is to prepare the witness on this issue as well, including: (a) Talk about preparation, and how it's a common, appropriate thing, not something sleazy or suspect (e.g., "I wouldn't be doing my job, if I didn't meet with witnesses before an important trial/deposition/hearing like this one..."), and that any effort by the other side to paint it in a bad light is silly - at best (they prepare their witnesses too!). (b) Make sure they understand that you are not "their lawyer", and this is not privileged. The other side may very well ask questions about the preparation, and that's OK. (c) Make sure you talk - early and often - about what preparation is and is NOT. This is NOT a "rehearsal", or me telling you what to say: I'm just asking questions to find out what you know and what your reaction would be to some of the other evidence, etc. (d) Finally, make clear - early and often - what you are asking from them: The truth. (e.g., "That's all I want. If I ever say anything or ask anything that makes you wonder, please stop me, and we'll fix it. I want you to be 100% comfortable if anyone ever asks you what I asked you to say, it's 'the Truth' - no more, and no less."). Then, make sure that's how you prepare them: everything is in the form of a question. Obviously, there are some other adjustments: for example, no transcript for the mock deposition, etc.

**Question:** Is there in you opinion such a thing as an "overcoached witness?" If so, what are the things to guard against in preparing a witness?

**Answer:** I think there are really two parts to this, with very different answers: overscripted, yes, overprepared, not really. Overscripted is a problem because some lawyers think preparation means giving a witness a script. But that is often neither ethically or practically correct. Practically, actors spend years of training and practice learning to read or memorize a script, and make it sound natural. Witnesses don’t have that background, and juries are pretty good at spotting a fake, a robot. The real point of preparation is just the opposite: to help the witness be ready to react, respond, and think. In that regard, overpreparation is rarely a problem. Lawyers worry that witnesses will follow the rules too closely, but that rarely happens. FAR more often, witnesses forget or lose track of the rules.

**Question:** When preparing multiple witnesses for testimony in the same matter, do you allow them to discuss their testimony with one another or do you instruct them not to discuss it?

**Answer:** No, I generally tell the witnesses not to talk about the case with each other. I explain to them that it serves no good purpose, and it only gives the questioner an easy thing to muck around with: 1) to see if he can get the witnesses to contradict each other on what was said, and 2) to use it to claim that the witnesses were concocting their story. It aint worth it. You're the lawyer, you can be the common bond.

1) **Introduction:**

**Question:** I want to be as sensitive as possible while asking this question but does your witness preparation differ based on a witnesses intelligence/sophistication level? Do you ever feel like a "less is more approach" is better with clients that are not as sophisticated?
**Answer:** My witness prep approach differs with EVERY witness, based on all kinds of things, including sophistication. But being a good witness is defined by many factors: often the most intelligent and articulate people are the worst witnesses: they're too used to being in control, to having all the answers (or faking it), to talking too much, etc. On the other hand, less sophisticated folks may be MORE open to and eager for your help and advice. These rules are not brain surgery, just common sense, once someone really understands and accepts the process. Help them do that, and you may be amazed at some of the results.

2) **Review the Facts:**

**Question:** What comments do you have on asking a witness to review documents in advance, and questions about what he reviewed? Documents the witness may never have seen before?

**Answer:** I know there are some arguments to the contrary, but I think on balance its very important to show the witness the important documents, and take the time to discuss issues of credibility, language, and context (and "spin"). But also be clear that this is not school: he's not going to be graded on how much he memorized. This is just to get him comfortable with some of the documents and allow you to ask questions about them. It is NOT a substitute for being careful about documents in the deposition, and reading them!! As to questions, this varies some by jurisdiction, but I believe that a lawyer's decisions on which documents among many are important enough to show the witness in prep, is itself a work product privileged decision, and the witness should not answer.

**Question:** You have said that you should not script a witness. I have a script for direct questions, and do the dry run with the script. Do you disagree with this approach?

**Answer:** Interesting compromise. No question about the merits of a dry run. But my fear with the half script, is that the witness will still feel compelled to study it and try to memorize both Q and A - even though unwritten. Most witnesses are really bad at memorizing, and look bad trying.

3) **Review The Process:**

**Question:** Question: have you ever seen a witness do well under questioning only to undo some or all of her testimony with an unguarded off-the-record comment overheard by the other side in the lobby/lift/toilet? What do you say about the conduct you expect of a witness outside of the deposition?

**Answer:** Great question and yes, I've seen it happen. First, lay the groundwork by preparing your witness about privilege: what it is, how/when it works, why it's important, etc. Second, prepare them to understand that outside of the prep room (and other direct conversations with you alone, there is no such thing as "off the record". Third, help them understand that one of the several ways that depositions are deceptive, is that they can give the appearance of informality: a conference room, chatting at breaks, etc.. But there is NOTHING informal about it, and other than your lawyer, no one in the room is your friend - even though they may work
hard to make it look that way, to lure you into letting down your guard - in or out of the testimony room. Don't be fooled.

**Question:** Please discuss the danger of witnesses bringing materials to a deposition without the knowledge of their attorney.

**Answer:** Good point. As part of explaining the process to witnesses, be sure to tell them not to bring anything to the deposition, and reinforce that in your scheduling letter to them, and final instructions. First, anything they bring, the other side will ask to see. Second, whatever they bring gives the other side insights into what the witness is concerned about. Third, if the witness brings stuff that they haven't shown counsel, some of it may be inappropriate: personal notes, privileged documents, undisclosed documents, etc..

**Question:** Aren’t the points too numerous for witnesses?

**Answer:** I worked with a lawyer many years ago who gave each witness a memo with something like 46 rules. All great rules, but it occurred to me that no one was going to remember #43, once they turned the page. So we've focused on ten basic rules, with the understanding that: (1) different rules will be higher priorities for different witnesses/cases; and, 2) both you and the witness need to understand that the goal here is not perfection. Juries don't want robots as witnesses: they want real people who may forget the rules sometimes and make mistakes, but who have absorbed enough to do a better job in this strange and unnatural world.

4) **Put It Together:**

**Question:** Do you provide non-privileged witnesses with outlines or hand-written notes?

**Answer:** I generally do not give my written materials to non-client witnesses, because I assume anything I give them may be discoverable. I do have a 3-4 page summary memo that I sometimes give them, that goes over The Ten Rules, and is written in a way to withstand disclosure.

5) **Anticipate Problems:**

**Question:** What do you do with your client/witness who tells you that she can't give her deposition or testify in court due to nervousness? Reset or push them to go forward as scheduled after your first preparation?

**Answer:** Talk with every witness about nervousness, so it's out there in the open. Help them understand that everyone's nervous in legal proceedings: some of us just are more experienced at hiding it. It's OK. You should be nervous: this is important. I'd be more worried about you if you weren't nervous. Judges and juries are nervous too, and they don't like smooth operators or robots talking to them. They like real, nervous, honest people. That's you. So, the key is, don't be nervous about being nervous. Deal with the symptoms, don't worry about the disease: what silly things do you do when you're nervous? Talk too fast (like most of us)? Slow down. Etc. On the question of delay, you have to make a judgment call: one preparation session may not be enough for this witness. Can you squeeze in another round? On the other hand, at some point, if you reset, why/how do you think this will get better - or will it just create more
time for anxiety? Practice, practice, practice: help the witness understand they can really do this, then let er rip.

**Question:** How should a witness be prepared regarding non-verbal communication (e.g. eye contact, body language, etc.)?

**Answer:** Thoroughly. Use your time with the witness to assess their non-verbal communication, then help them improve. Go through it all and practice it: who should she look at (questioner, videographer, NOT you), how is she sitting (up straight, avoid distracting habits, etc.), what is her body language saying (relentlessly polite and positive), etc. At the same time, prepare her to ignore the questioner’s body language: it’s a distraction from the question itself.

**Question:** In sensitive cases such as domestic violence cases, how do you keep from re-victimizing the witnesses besides encouraging them to have a thick skin?

**Answer:** Tough one. There are some cases where we wish we could do witness prep in a bubble, or avoid it entirely. But of course we can’t. Here are a few thoughts. First, talk about it: explain the process, the nature and purpose of direct and cross, why it’s so difficult for victims, and why it’s so important that they not let the bad guys win. They’re a survivor: they can survive this, and come out on top. But it takes work. Second, practice it. You know what’s coming. The witness needs to know, and know they can handle it from a real mock exam. Third, prepare them to know they have options: slow it down, take a deep breath, a glass of water, or a break if needed. Fourth, be sensitive to how you can help: are there pretrial protective orders that might limit the cross (or give you and the witness a better idea of what’s coming, if you lose)? What can you do in trial in terms of objections, etc.?

6) **Dry Run**:

**Question:** How much is your prep time spent going question-answer-critique and how much of your time is spent going through a straight run-through for multiple questions in a row?

**Answer:** I consider the two very separate. As I’m going through the rules, the facts, the themes, etc., however long that takes, I will often do some Q&A examples (“So, if you were asked __________, what would you say?”). However, at some point, you need to stop going back and forth between roles, take a solid block of time (hopefully 2-4 hours), and do a realistic, non-stop dry run. If budget and privilege allows, have a court reporter or some other method to get a transcript, which you can then use to go back and critique and discuss with.

**Question:** Do you stop the mock deposition to make points at that time or do you wait until the end of the mock deposition to do this.

**Answer:** No. I emphasize to the witness that the more realistic the mock is, the more helpful it will be to them. Having said that, you have to be able to refer back to what happened, and help the witness understand. That’s why, whenever possible, we bring in a court reporter for the mock, or at least a tape recorder, that we can have someone transcribe.
7) **Review the Transcript/Video:**

**Question:** Do you use cameras on mock depositions to show the witness his mistakes?

**Answer:** I generally use video only when there is a video deposition, so the witness can get comfortable with it, see what it looks like, and address any problems/issues. Otherwise, I think a transcript is more manageable and useful.

**Question:** If you tape or record a practice deposition, do you have to turn this over to the other side?

**Answer:** If you are working with a client, I don’t think so. This is a privileged communication (and I always start the mock with a strong statement to that effect), done to explore issues and give advice in anticipation of litigation. I prepare witnesses to not talk about anything that happens in the prep room, as privileged, and jump fast to object if the questions violate that space. If the witness is not a client, then the answer is likely different, and I generally would not record it.

8) **Core Themes:**

**Question:** What can attorneys do to develop a case theme and goal with the witness?

**Answer:** I think developing a set of core themes - or "home bases" is a key part of any litigation process. These should be 3-5 short, clear, but powerful statements that present your case. They are the answers to the Juror’s question: Why? “Why did this happen?” “Why are we here?” It's a two-way street with witnesses: work with them to help you develop, test, and refine your core themes, but also give them a set that they can always come back to: like the "home bases" in a child's game of tag.

**RULES:**

**Rule 1: Take Your Time**

**Question:** Why is it so important to slow down?

**Answer:** Like a volley in tennis or many other sports, the faster it goes back and forth, the sooner someone will make a mistake. But in sports, that’s fair: whoever makes the mistake, loses the point. In a witness environment, it’s totally unfair. If the questioner makes the mistake, no one cares: they’re not under oath. But if the witness makes a mistake, it can create serious problems right then, and be the “Gift that Keeps on Giving” going forward. The witness has the right, the responsibility — and the good reason — to slow down.

**Question:** Aren't you worried that the judge or jury will think the witness is evasive if he goes too slow?
Answer: No. If it’s a deposition, of course, I don’t care what it “looks like”: the transcript is what matters. But I don’t think it “looks bad,” regardless. Obviously, any of these rules can be taken to an extreme that becomes counterproductive, but it so rarely happens, that I don't even like to discuss it with witnesses. I've had lots of opposing counsel complain that the witness was going too slowly but I've never heard or sensed that from a judge or jury. I think they understand that this is difficult - and important - and appreciate a thoughtful witness.

Rule 2: Remember You're Making a Record

Question: What makes language so important?

Answer: In a normal conversation, we are very casual - even sloppy - about language. If the other person isn’t sure what we mean, it rarely matters. A witness, on the other hand, is essentially dictating the first and final draft of an important document - under oath! Each word counts. If you’re not sure what the questioner means by a word or phrase, it’s too important to guess. Just say, “please rephrase the question.”

Question: If the witness isn't sure what the questioner means by a word or phrase, shouldn't she just state her interpretation?

Answer: No. Everyone in the room has a job to do: it's not the witness' job to do the questioners job. Insist on clear and fair questions. "Please rephrase the question." Then wait for the questioner to make it clear. Giving the witness' interpretation should only be a last resort.

Rule 3: Tell the Truth:

Question: What do you mean by the, “Oh, What the Heck,” Syndrome?

Answer: As the questioning drags on, with repetitious and accusatory questions, it is so tempting to say, “Oh, What the Heck,” and give them more of what they want, even if it stretches the truth. Maybe they’ll go away then. But they won’t, and stretching the truth to make someone happy is a dangerous game. There are no shortcuts here. Stick to the narrow, precise line of “the truth, the whole truth, and nothing but the truth,” whether or not if makes someone happy. It’s your oath. It’s your testimony. Once you veer off track from the truth, it can be very tough to get back on.

Question: What do you do when you suspect the witness you're preparing is lying?

Answer: Tough challenge. A few thoughts. 1) why are they lying? Help them understand that every witness has problems, every witness has issues. Judges and juries understand that: they don't want perfect robots as witnesses. Whatever the problems, we can deal with it, we can work through the best way to address it. Far better for the witness to bring it out, than for the other side to do it. 2) Remind them of what they've seen on the news: Gates, Lay, Stewart, Libby, Clinton, Koslowski: a parade of extraordinarily intelligent and successful people who have had disastrous experiences as witnesses. Why is that??? Because in our normal lives, we lie all the time: little white lies that help us get through the day, avoid offending people, etc. And we're used to not being challenged, and getting away with it. As a result, we're not as good
Mistakes:

**Question:** How do you advise a witness to deal with misstatements or inaccuracies during the course of their testimony?

**Answer:** This is such an important point. Just briefly: 1) Talk openly with the witness in prep about mistakes: everybody makes them, and it's OK. Everybody's nervous in court, everybody knows they'd make mistakes if they were the witness, and judges and juries want real people talking to them, not robots. 2) When people make mistakes in a witness environment, they are reluctant to say so. Don't be. When you make a mistake, don't try to talk your way out of it: just stop and fix it. Remember the Law of Holes: "when you're in a hole, stop digging!" 3) help your witnesses by introducing them to the word "clarify". It's a great word: you can clarify anything, and it carries with it the image of trying to make the record better.

**Question:** What do you do when your witness says something that you know is not accurate and you know the witness just made a mistake?

**Answer:** First, work on your poker face: don’t react in a way that telegraphs a problem. Second, try not to interrupt: I've seen lawyers in this situation interrupt their witness with something like, "are you sure?", and the witness is surprised and confused, so gets defensive: "yeah, I'm sure!" Third, call for a break ("Mr. Witness, do you need a break?"), and once outside, in that less threatening environment, show documents or ask questions to help the witness understand his mistake. Fourth, teach all witnesses the word "clarify": we all make mistakes, they will too, and they can "clarify" anything, at any time. So they can go back after the break and say, "Before you ask another question, I just wanted to clarify something from before. During the break, I saw my June 3d email, and realized that ____________________".

Rule 4: Be Relentlessly Polite:

**Question:** If the questioner is being sarcastic or accusatory, why can’t I respond?

**Answer:** “He who writes the rules, wins the game.” Don’t play their game. As unnatural as it may sound, the questioner is usually not the witness’ main audience: it’s the judge, jury, or other finder of fact. If you allow yourself to get distracted by arguing with or counterpunching or being defensive with the questioner, you will not be as good a witness for the real audience, and lose the opportunity to communicate effectively. Lawyers know this, so if they can throw in “three teaspoonfuls of righteous indignation,” to distract the witness, why not? Don’t play their game: ignore the nonsense, and kill them with kindness.

**Question:** From these questions it sounds like enforcing "civility" in taking and giving testimony is key to properly preparing Witnesses. What about from the judge?

**Answer:** Your question about rudeness is, sadly, an increasingly common problem. First, prepare your witness that dealing with this is the lawyer’s job. The witness' job is to not let jerks win: be relentlessly polite and relentlessly positive. Don't let him distract you from doing your
job, that's all he's trying to do. Second, you make a record of objecting to every bad statement and - more important every physical gesture, raised voice, or other things the court reporter might not get. Third, yes absolutely prepare the witness for the judge's role or style, and how/why he does what he does. Bad behavior by the judge is a lot less shocking and intimidating, if you've talked and laughed about it beforehand.

**Question:** How would you recommend preparing witnesses for the discomfort they are likely to experience in a deposition in which a company representative alleged to have harassed or even assaulted the witness will be present assuming negotiations to exclude the representative have been unsuccessful?

**Answer:** First, that's why counsel is there: intervene and say something. Ask counsel to advise the audience to act appropriately. If it doesn't happen, indicate that you will not go forward unless they start acting appropriately. Second, teach the witness to ignore it. Rule 4, "Be Relentlessly Polite". They're acting inappropriately: don't stoop to their level, and don't play their game. They are trying to throw you off: don't let them. Don't let jerks win: kill them with kindness, and good testimony.

**Question:** What do you think of dealing with the questioner cutting off the witness by asking in your cross the questions whose answers were cut off and saying "What else did you need to say to finish answering that question?"

**Answer:** That's a fine response, but to me, that's the last resort. The key is that both counsel and the witness need to prepare to never let the witness be interrupted. Whether its accidental or intentional, the witness should never allow opposing counsel to interrupt. It's the witness' testimony. Just pause, and then politely but firmly (Rule 4), say "I'm sorry, I wasn't finished with my answer. I need to finish it, then I'll answer your next question." Then finish your answer - but really finish it! Some witnesses will shorten their answers when interrupted. No. Answer fully and with gusto, and you may find that you get fewer interruptions.

**Question:** Would you ever under any circumstances stop a deposition of your client witness. How do you handle the extremely difficult lawyer in a deposition?

**Answer:** Absolutely. My first obligation is to protect my client, including from abusive treatment. Obviously, walking out is a last resort. Make a record. With a good record, consider your options, which may include videotaping the deposition, calling the judge/magistrate, getting a special master or someone appointed to run the deposition, or stopping the deposition and filing for a protective order, sanctions, etc.

**Question:** How do you rehabilitate a witness who has broken down sobbing during cross-examination.

**Answer:** Tough challenge, and will depend a lot on the circumstances, but a few thoughts: 1) Why did the witness cry, and does the judge or jury know why? If not, you need to work with the witness to make sure they understand. 2) does the witness need a break? Water? 3) How can you turn those tears into something positive? In many cases, a witness who
cares deeply is a good thing, not bad. Maybe you should ask the witness why? "Mr. Witness, tell the jury why this so emotional for you?" "Really, why is that?", etc.

**Rule 5: Don’t Answer a Question You Don’t Understand:**

**Question:** If I say, “please rephrase the question,” he’ll just ask the same question again.

**Answer:** Three answers: First, so what - what have you lost? You’ve slowed the process down and given yourself a chance to hear the bad question again. Second, you’ll be surprised how often it does work, and you get a clearer, fairer question. For all kinds of reasons: may be you caught a bad question. Maybe he’s forgotten what he asked. Whatever the reason, it works. Third, stick to your guns. The witness has a right to clear and fair questions. By ignoring your polite request to rephrase, the questioner has ignored that right. Don’t let it happen.

**Question:** You say the witness can question the questioner. But more than once I have heard the questioner say to the witness: I am asking the questions, not you.

**Answer:** Good point. The witness generally "questions the questioner" by challenging bad questions, which should usually start with the basic, "please rephrase the question". If the witness understands from prep that they have a right to clear and fair questions, but they will only get them if they stand up for that right, then they will be more comfortable if the questioner challenges them in the way you suggest, in saying, "Yes, I'm here to answer your questions, but first I have to understand them."

**Rule 6: Memory:**

**Question:** Won’t I look bad if I don’t remember?

**Answer:** No. The hardest think about being a witness is not making clear what you know, it’s making clear what you don’t know, but that’s essential to telling the truth. Memories fade quickly, and litigation takes too long. That’s not the witness’ fault. Just be aware that, unlike in a normal conversation, if you simply say “I don’t recall” - which is all you should say if you don’t remember - you may get more questions on the same issue, to push your memory. Don’t get pressured into trying too hard. The answer remains the same.

**Question:** How do you defend a witness who has memory problems caused by age or illness and has a spotty memory of facts?

**Answer:** Tough challenge. A few thoughts. 1) Rule #6: help the witness understand that it's OK: everyone has memory issues. Theirs may be more than others, but there's no shame in it. 2) Work with them to develop tools to help them remember: what documents, dates, etc. will help them most? 3) If appropriate, make a record: either you or the witness put something on the record at the outset that he has memory issues, and may need help along the way. Then prepare your witness to use that statement as a resource as needed ("as I said at the beginning...").

**Rule 7: "Don't Guess":**
**Question:** But don’t we draw inferences and conclusions all the time?

**Answer:** We do, and it’s a wonderful part of normal conversation. We take pride in our ability to draw inferences. But this is not a conversation! The witness has taken an oath to tell, “nothing but the truth.” Inferences are opinions and guesses, that violate that oath. The more intelligent and articulate the witness, the harder this is to do. It take practice to avoid falling into that trap.

**Question:** Re the "don't guess" role, how do you feel about the witness testifying about what he normally does even if he doesn't recollect the specific instance?

**Answer:** Habit or practice testimony is generally fine, depending on the jurisdiction and the circumstances. Just have the witness make clear that is what they are doing, so it doesn't get confused.

**Question:** How should witness deal with hypothetical questions when they are not designated as an expert?

**Answer:** Rule 7: Don't Guess. Hypos are one of the worst types of guessing, and thus are contrary to the oath the witness has taken to tell, "nothing but the truth." Prepare your witnesses to understand what a hypo is and why they're wrong. Also, they need to understand how absurd it is to take a real world situation or issue, and compress it into some silly hypo, when in reality the answer would depend on so much more. Finally, talk about the "Golden Rule": hypos are generally just a way to get the witness to criticize or second-guess someone else. If the roles were flipped, would this witness want someone passing judgment on them, based on a distorted and oversimplified question? No. "Do unto others..."

**Rule 8: Don't Volunteer:**

**Question:** How can you help with a client that you've fully prepared but nonetheless testifies without really attempting to infer what the questioner's poorly worded question is asking?

**Answer:** If you sense in prep that you have a talker (or even if you don't), address the three key issues: First, Rule 8: don't volunteer. Question, Pause, Answer, Stop. Don't do their job by volunteering. If I object, saying something like, "You've answered the question", STOP. Second, don't be nervous about being nervous. It's OK: everyone is nervous (some just have more experience hiding it), and that's fine, because this is important. Deal with the symptoms, not the disease: if you talk too fast or too much when you're nervous (most of us do), slow down, take deep breaths, and count to 5 after EVERY question. Third, take breaks. You're the witness, and this is an exhausting process: you can take breaks any time you want to, and you don't have to explain or justify it. And if I ever ask "Do you need a break??", the answer is...."YES!"

**Question:** Notwithstanding Rule #8 - Don't Volunteer - should the witness answer more than just a "Yes" or "No" on cross examination? In other words, does Rule #8 apply to a witness when being cross examined by opposing counsel?
**Answer:** “Don’t Volunteer” does not mean just say yes or no. First, prepare your witness that there may not be very many open questions on cross ("what are your job responsibilities", etc.), so listen for them, and take advantage of them, in a careful, prepared way. Second, prepare them to understand that despite what the questioner might say, very few questions are really short, clear, and simple enough to answer just yes or no. Most require some explanation. Insist on that right.

**Question:** What about requests for a witness to draw a diagram?  

**Answer:** This may vary by jurisdiction, but my general understanding is that a witness cannot be compelled to create anything, so it's a judgment call, and my judgment would usually be: "NO". Your witness is neither an artist nor an architect, nor is he/she perfect. Any mistakes in a diagram, whether of people, places, perspective, etc., where a witness might in the real world just throw away that draft and try again, become part of the permanent record and, for the other side, "The Gift that keeps on giving!" Why run that risk. If there is a simple diagram that YOU want the witness to draw, practice it, and even then, maybe bring a good copy with you. Also, if you think the other side may ask your witness to draw, prepare him for that request: so he knows it's not required, and won't be badgered into it. Tell him (or her) they can laugh it off, with stories of trying to draw for their third grade art teacher.

**Rule 9: Be Careful About Documents:**

**Question:** What is so dangerous about documents?  

**Answer:** We give a certain magic to the written word: “If it’s in writing, it must be true!” But a document is only as accurate as its author’s knowledge, memory, or intent. So, if the witness didn’t write it, there is very little they can say about it that isn’t guessing. Handle with care. Treat all documents with a simple but absolute protocol. If you are asked a question, the answer to which is contained in a document:

1) Ask to See it.  
2) Read it.  
3) Ask for the Question again.

**Question:** When if ever can a cross examiner be permitted to test credibility by not showing a document to the witness?  

**Answer:** This may vary by jurisdiction, but generally the examiner is not legally required to show a document to the witness. The goal of the examiner is to delay that as long as possible (e.g., "we'll get to the documents, Madame Witness, but first I need you to answer my question, which is....."). But regardless of the legal requirement, it's all about fairness and not letting the questioner play games. The goal of the witness is to get the document in front of her (e.g., "may I see the document please", "gosh, I'd really need to see the document.” “Without seeing the document, I can only guess going back that far.").

**Question:** During witness preparation do you distinguish between the use of documents to refresh recollection and simply discussing documents that might be provided during the deposition or testimony?
**Answer:** Always help a witness to understand the difference between refreshing memory and creating memory. Anything can refresh memory, as long as it truly brings back an actual memory, but nothing should create memory ("must have", "should have", "would have", etc.). So, while it's helpful to review documents so the witness will not be surprised, and in case they refresh memory, if the witness did not create the document, the witness cannot vouch for it, and must not allow it to create memory.

**Question:** What about questions regarding what documents the witness was shown by counsel, in the preparation?

**Answer:** This is based on local rules/practice, but generally, I do not think it's proper to allow such questioning, and I know many lawyers who won't allow it. I think it侵犯s on both the attorney-client privilege, and the work product privilege, in the lawyer's decisions as to what to show the client. The best contrary argument is that the document refreshed the witness' memory, so counsel should be allowed to see it: so prepare your witnesses for that. If the local rules and/or practice allow such questions, prepare your witness for them. Also, remind the witness of my Rule #6: "If you don't remember, say so." You've shown the witness a lot of documents: this is not some silly memory contest. If the most truthful answer is, "Gosh, I looked at a ton of documents, don't remember which ones.", so be it.

**Rule 10: Use Your Counsel:**

**Privilege:**

**Question:** How do you as counsel and your witness control the answers to questions touching privileged information?

**Answer:** First, help your witness understand the privilege - most people (including some lawyers) have only a vague notion - what it is, how it works, why it's important, how it can be waived unintentionally, and how it may apply here. Second, prepare them that if they think a question may get into privilege, STOP. Don't answer it until counsel has told you to. And if counsel objects, stop talking, and if he instructs you not to answer, please follow those instructions.

**Question:** What do you say about how witnesses should respond when asked about preparation?

**Answer:** First, prepare the witness on the issue of privilege: what it is, why it is, how it works. Any communications they have with others, outside of the prep room (including email, texts, conversation) are easy prey for the other side. Don't create that added burden for yourself and others. Use your lawyer as the bad guy if it helps, and just avoid any outside communications. The prep itself - and any oral or written communications with counsel - is strictly privileged. If you violate the privilege in one area, you may have waived it across the board. Don't. Second, prepare them for questions about the prep, so they're not surprised. Lawyers often ask about what I call the "logistics" of the prep, and that's fine: where, when, how long, etc., but nothing about what went on in the room.

**Objections:**
**Question:** What are some practical pointers for making objections during a deposition?

**Answer:** First, prepare your witness to understand objections. Many things lawyers say are incomprehensible for two reasons: 1) It's shorthand; and 2) It's legalese. To understand it, normal people have to undo those two things. So, "Objection To Form" is not some lawyer's game that they should ignore: 1) Its shorthand, for "I have an objection to the form in which that question was asked." 2) It's also legalese, which in English means: "Hey, I got a problem with that question!" If the witness understands that, then "Objection to form" should be sufficient for many issues. If that doesn’t work, then you have to know how far your jurisdiction will allow so-called "speaking objections", and review a few basic ones with the witness in prep, such as, "Objection, calls for speculation."

**Question:** When can you instruct a witness not to answer?

**Answer:** It varies some by jurisdiction, but in most places, instructing not to answer is not allowed, unless its privileged, or some other extreme situation. The key is to help the witness understand that, "please rephrase the question" or "I don't understand the question" ARE answers to the question. Stick to your guns: don't answer a question you don't understand.

**Breaks:**

**Question:** What do you do when your witness says something that you did not know about and is not favorable?

**Answer:** A few thoughts: 1) Alas, it happens all the time. Not necessarily a sign of anything other than human nature. 2) How's your poker game? Whatever you do, do not let on to the other side that this is new, or damaging. They will only push it harder. 3) Hopefully, you have prepared your witness that when you ask, "do you need a break?", the answer should be..... "Yes!!". Now would be a good time, to find out more about what he's just said, and how/why he didn't say it before. And, 4) While you're on break, push to find out if there is anything ELSE he hasn't told you, now that it's clear he didn't tell you everything, as you asked (did you??).

**Question:** What about breaks during the actual question (in other words, before the witness answers)?

**Answer:** In most jurisdictions I know of, you're generally not supposed to take a break while there is a question pending, unless it raises an issue of privilege, etc. Prepare your witnesses for this, and help them understand: 1) ask for the break as soon as they finish their answer, before the questioner can bark out another question; 2) I believe that, "Please Rephrase the Question" (Rule 5) IS an answer. Then break. 3) Hopefully, you have prepared your witness that when you ask, "do you need a break?", the answer should be..... "Yes!!"

**Question:** What is your advice regarding attorney-witness conferences, during breaks in a deposition?

**Answer:** First and foremost, whatever the rule is, prepare your witness for it. I always tell witnesses that they need to take breaks: that being a witness is surprisingly exhausting, and
they need to pace themselves and take breaks, or they'll lose focus. This is also a good time to
tell them what will happen during a break (e.g., "I may ask you some questions if I'm confused,
or you can ask me questions if you are, etc.'), or what will not happen (e.g., "Our local rules say
that we can't talk about your testimony during breaks, so don't think I'm being rude or weird, if I
talk about the Red Sox."). Legally, the general concerns include: (a) What are the local
rules/law regarding attorney conferences, if any? (b) what is the local practice? Sometimes the
local practice is more liberal than the actual rule, since the lawyer on the other side may want to
confer with their witnesses at breaks too … (c) if either law or practice limit conferences, is the
limit in the form of a ban, or - as in some jurisdictions - in the form of allowing opposing counsel
to ask about the conferences. If the latter, that's OK: just prepare your witness, so they know,
and then conduct the conference accordingly (e.g., "We're trying to get at the truth here, and
some of these questions are confusing/long/vague/compound/etc., so I just wanted to ask you a
few shorter questions to clarify this, or show you some of the documents the other lawyer is
referring to, but not showing you. Would that help you?").

Redirect:

**Question:** Do you typically ask many follow-up questions of your witness in a
deposition, especially if the witness did not or was not able to tell their whole story?

**Answer:** There are different schools of thought on this, ranging from people who never
cross unless there is a disaster, to those who always do. I'm in between. "No Questions"
certainly has a nice ring to it, and doesn't risk re-opening things to rebuttal, but don't always fall
for its allure. First, prepare your witness for how this works, and that the other side asks most of
the questions, but I often have some, to explain, fix, complete, or amplify some answers. It's not
a bad thing if I ask questions, not a sign that you've done poorly. It does give the other side
another chance, but that's OK. Second, think carefully about your witness and the posture of
your case: do you need deposition testimony to support pleadings, etc.? You may want to work
with your witness to prepare for you to ask him some basic questions about key issues/facts, if
they don't come out in the other side's questioning, so that you have good, carefully considered
answers on the record for future use.

**Special Witnesses:**

**ESL:**

**Question:** Do you have any suggestions about how to deal with foreign witnesses when
you are concerned that their foreign status accent or language abilities may be used against
them?

**Answer:** Regarding foreign witnesses, first, prepare them to be open about the language
issue. Try to take extra time - in the prep and their testimony - to talk about their origins and their
accent. Then take extra time - in prep and testimony, to search out some heartwarming stories
about their lives, families, etc., so the factfinder hears them speak - accent and all - about good
stuff. One other thought about translators: use them. Witnesses often resist using a translator out
of embarrassment, but that becomes a big mistake when they get confused or upset on the stand.
Being able to manage very basic conversational English is very different from rapid-fire questioning.

**Question:** What is the best way to prepare a witness who requires a translator at the deposition? What if the translator at a deposition does not accurately translate the witness's respond or the deposing attorney's questions?

**Answer:** Help them understand, and find ways to explain to the fact finder, that translation is not always automatic: jargon, slang, and other language issues just don't translate well. Take your time and don't get frustrated: if you don't understand the question, say so. On the other hand, err if at all in favor of using a translator: some witnesses will resist it, but they risk serious miscommunications. The second part of your question is tougher. If you have any reason to doubt the accuracy of the translator, steps might include: 1) have someone else there who knows the language, and object to every mistranslation. If it gets too bad, stop the deposition: it's a waste of time (and dangerous for you and the witness). 2) make sure the deposition is tape recorded, have the tape and transcript carefully reviewed by a second translator, and do an errata sheet.

**Corporate Rep (30(b)(6)):**

**Question:** Do you have any particular advice for preparing witnesses for a corporate representative deposition?

**Answer:** Yes. First, the basic ten rules still apply. However, a corporate witness represents the company, not one individual's memory, so the common witness answers of, "I don't know" and "I don't recall", don't really work here. Use the list of subject areas in the subpoena/notice from the other side (and push hard for more specificity), as the guide to develop the facts, and the company's perspective, on each issue. Push the company to make sure you have the best possible witness (not just the employee who has time on their hands). Then make sure the witness is comfortable and prepared on each one (or get another witness).

**Experts:**

**Question:** Do you change the witness preparation for expert witnesses instead of client witnesses?

**Answer:** The rules definitely apply, and the key is to remember who's the captain of the ship. If things go wrong, the client will blame you, not the expert: it's your case, make that clear to the expert. Always remember, and say it to the expert if you have to, that if someone tells you they've testified many times before, that may just mean that they've developed some very bad habits! You need to know.

**Question:** What do you do when the professional opinion of your witness is CLOSE to what you want from the case but not Quite what you want (referring to a child custody situation - I like the general attitude but not the specific opinion itself for my case)?
**Answer:** Tough one. Make sure you have carefully explained your case, the law, what's at stake, and what you need from the witness. Then practice: lay the foundation, then explore all the different ways to approach the issue and ask the questions to get what you need. In the end, though, a witness who is sympathetic to you on generalities, but helps the other side on specifics, may hurt more than help. Tell the witness that.

**Adapting to the Situation**

**Video Depositions:**

**Question:** Unique tips for prepping for video depositions?

**Answer:** Just briefly: 1) if time and budgets allow, use video during the prep; 2) regardless, demystify video: in this day and age, most people have video cameras on their phones, it's no big deal; and 3) point out the advantages of video, including making the questioner behave better, and solving one of the toughest problems for witnesses: who do I look at when I'm talking? Answer: look at that nice videographer.

**Hearings:**

**Question:** In a hearing how do you handle a judge/ALJ who obstructs your questioning or your witnesses answer.

**Answer:** Same as we tell witnesses to handle lawyers who act that way: relentlessly polite, relentlessly positive, but relentless. Don’t whine, don’t get angry. But make clear on the record that you had not finished your question, and it’s important to the proper presentation of your case, or your witness had not finished her answer (practice with your witness: don’t back down. If I say, or the judge says, "are you finished with your answer?" that probably means, "NO!") and it's important to an understanding of the facts.

**Direct vs. Cross:**

**Question:** Are there any key rules to add when preparing a witness for a direct or cross examination setting?

**Answer:** As with every witness environment, the key is to help the witness understand and prepare for both the form and substance. In terms of substance, explain the purpose of direct vs. cross: direct is intended for the witness to tell their story. Cross is not. In terms of form, many lawyers don't really know the difference between leading and non-leading, so don't expect the witness to: explain it, demonstrate it, talk about it. It means that on direct, they have to take more of the initiative to tell their story.

**Question:** Do you have any special advice to give witnesses when a judge asks a question to the witness?

**Answer:** The rules still apply, but prepare your witnesses on who is likely to ask questions, why, and what they're looking for. Unprepared witnesses sometimes are surprised by
questions from the judge, and afraid it means something bad, or they've messed up. In fact, it can be a great opportunity to listen, respond, and connect.

**Question:** How do you make sure your witnesses don't apply some of these rules to cross examination where they can't just say "I'll continue when you let me finish"

**Answer:** I have to disagree somewhat with the premise: if you consider the rules carefully, I think they DO apply to cross: on steroids! First, prepare your witness that there may not be very many open questions ("what are your job responsibilities", etc.), so listen for them, and take advantage of them, in a careful, prepared way. Second, prepare them to understand that despite what the questioner might say, very few questions are really short, clear, and simple enough to answer just yes or no. Most require some explanation. Insist on that right. If you are interrupted, say so, and push - politely but firmly - to finish.

**Arbitration:**

**Question:** Is preparation different for witnesses in an AAA arbitration?

**Answer:** Fundamentally, all the rules definitely apply. Prepare your witness for both the form and substance: they need to speak to the arbitrator(s), who may also and questions. Their questions are a good thing, not (as some witnesses assume) a sign you've done something wrong.