In recent years, this country has seen an explosion of government and private investigations, litigation, and other inquiries. With this explosion has come a great increase in the number and variety of people who have been dragged into these proceedings as witnesses—for either “informal” interviews or testimony. The result is that a large number of laypeople who have never been witnesses, and many lawyers whose practices have not previously involved witness preparation, have had to venture into this strange new world. Yet being a witness is often a significant event for the individuals involved and for the integrity of our system of justice. It demands careful attention and preparation by lawyer and client alike.

Recent scandals have shown that being called as a witness can happen to anyone: A young White House intern becomes the focus of a major criminal grand jury investigation, while everyone from the maid to her mom to the president becomes a potential witness. A stockbroker’s assistant brings down a homemaking diva. Whether the witness is a young student facing a disciplinary board, a businessperson facing the Securities and Exchange Commission, a health-care provider facing a jury, or any other ordinary person in this very extraordinary process, it can be a bizarre and frightening experience. In an ideal world, any inquiry ought to be an open, shared search for the truth. In reality, we operate in an adversarial system in which people get wrapped up in their “side.” As a result, they lose perspective and “see what they want to see,” and they do not simply ask questions to find out the facts.

First and foremost, the job of a witness is to tell the truth. Alas, it sounds simple, but it is not. The job of a witness is to keep perspective: not on some cosmic truth, but simply on the truth as they knew it then, and remember it now. This is neither an easy nor a natural assignment: to do it right takes hard work. The critical importance of preparation regarding the process of
how to be a witness—not just reviewing the facts—is based on the fundamental difference between communicating in a normal conversation and communicating in a precise and unnatural question-and-answer format.

The purpose of this book is to help lawyers improve their witness preparation skills. Parts of it are written in the “voice” of speaking to a client, because learning how to best communicate these ideas is often as important as the ideas themselves. Going through the general concepts, focusing on a series of clear and simple rules, then discussing how to adapt those rules to different situations can assist you in that preparation effort. The CD-ROM that accompanies this book contains all the appendix material, including memoranda outlining these rules (see corresponding filenames in the table of contents).

At times, the writing speaks directly to the witness; this is to give lawyers the option of sharing this book with clients. We all learn best by gathering information and understanding from more than one source and in more than one way. Think about how you learned a foreign language or other challenging subject in school: you listened to your teacher, read from a book, and practiced. No one would learn as well by doing only one of those three tasks.

The same principles apply to learning this strange new language. This book is not legal advice. It is simply intended to be another source of learning, to complement what clients hear from counsel and absorb from practice. Properly used, it should make the time a lawyer and client spend together more productive and more efficient.

The message to both lawyer and client is: Don’t be intimidated. You can learn this new “language” (actually, it is not so much a language as a communications process). Many people who go through the whole process find themselves surprised at what an intense, interesting learning experience it turns out to be. However, it will be very difficult unless you and your client understand one simple fact: This is not a conversation. It is, as they say in The Wizard of Oz, “a horse of a different color.”
Note

There are many different witness situations, from government interviews to formal jury trials, and everything in between. Each is different in various ways, and yet all are founded in surprisingly common themes, and all raise the same fundamental preparation issues. As a compromise to writing a book aimed at this full range of situations, I have focused most often on the middle of this range: the deposition. Later chapters address some of the differences, but what is far more striking are the similarities. All witness situations require this extraordinary preparation process, with the same basic concepts and rules.