

GIVING THE BEST ANSWER THE FIRST TIME: BERMAN'S REINVENTING WITNESS PREPARATION

BY DAVID C. SARNACKI

"A bird doesn't sing because it has an answer, it sings because it has a song."

— Maya Angelou

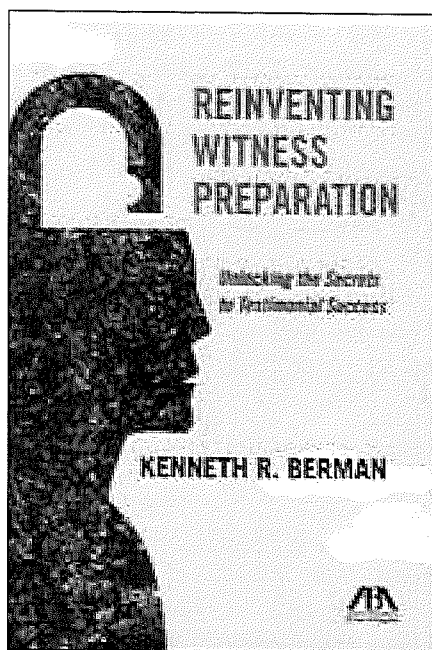
Advocacy involves singing a song that resonates with the trier of fact. For witness examinations—direct and cross—advocacy requires us to help our witnesses hit all the right notes. And that requires us to prepare our witnesses.

This book review provides a summary of *Reinventing Witness Preparation*, an exposé on the failings of traditional witness preparation and the benefits of a more modern, enlightened approach. Kenneth R. Berman's goal focuses on being proactive rather than reactive and on delivering the client's core message—the song—rather than avoiding any responsive information—gagging the witness. That goal leads to Berman's theme: giving the best answer the first time.

Better preparation delivers better outcomes. "How you prepare your clients will make the difference in how they answer [deposition and trial questions], and how they answer them is critical to whether they win or lose." Berman wants lawyers to teach the witness how to use what he or she already knows about communication and, by doing so, gain an advantage.

The traditional approach emphasizes teaching the witness new skills in an awkward dance to avoid delivering any meaningful information. That's hard. Picking up from where this particular witness is at and moving forward is simpler. It "gives witnesses the skill, confidence and frame of mind to answer the questions in ways that will help their cases, develop their case themes, and get their stories out."

Since most cases settle, persuasion before trial can be a more important influence on the outcome than a nuanced performance for a trial that never happens. Empowering the witness will add confidence and aid performance, whether



in a deposition or at a trial. "Witnesses need to give answers that actually help their cases, and the best time to give the best answer is when the question is first asked, whether on direct, on cross, or in deposition."

Traditional witness preparation often involves taking a witness's established conversational skills, turning them inside out, and imposing a fear of giving one bad answer. That fear funnels the witness into a path of saying virtually nothing and often failing to say the right thing. Berman's advice? Give the best answer the first time. "By offering the explanation when the question is first asked, it bolsters the witness' credibility. Spontaneity is more believable than something that seems like an after-the-fact orchestration between the witness

and the lawyer."

Berman has an abiding faith in the witness as a human being. He is confident that the person has answered numerous questions in the course of daily life, regularly clarifying and instinctively answering with "common conversational courtesy." "[A] properly prepared client can be very well positioned to decide, on the spot, whether to volunteer an explanation, using her intuition and judgment, her understanding of the facts and issues, and her sense of whether the failure to volunteer will leave a misleading impression or permit the opposing counsel to take her words and put them into a narrative where they do not belong."

The triers of fact are in a state of constant evaluation in search of the story. They have a job to do and have no interest in games, wasting their time, hiding or misleading or spinning or otherwise insults to their intelligence. They are pleased

when an attorney helps make their job easier. A properly prepared witness can take control.

Berman shows three key advantages of what he calls the enlightened approach. First, it empowers the witness to give answers that actually help tell the witness' story. Second, it promotes getting facts on the table as an aid to understanding, something the factfinder embraces. And third, it enables the witness to manage and control his or her testimony.

Reinventing Witness Preparation is 250 pages of principles and examples, spread across 18 chapters. There is no index and no appendix or forms. Berman is a litigation partner in Boston Massachusetts and a regular contributor to litigation section journals in the local, state and American bar associations.

Chapter 9, knowing and preparing your witness, includes detailed texts demonstrating the enlightened approach in practice. Those demonstration examples continue in other chapters that address particular types of questions and problems and counter witnesses. Berman uses the Tom Brady de-

flate gate incident to demonstrate the importance of having a theory of the case and a theme, as well as ensuring the witness understands and can communicate that core message.

So sing. Sing a song, sing out loud, sing out strong. And help your witnesses sing the winning song that wins the case.

K. Berman, Reinventing Witness Preparation: Unlocking the Secrets to Testimonial Success (2018 American Bar Association). \$64.95.

About the Reviewer

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