

# Preparing Witnesses

— 5TH EDITION —

A PRACTICAL GUIDE FOR LAWYERS  
AND THEIR CLIENTS

DANIEL I. SMALL

# Contents

<b>About the Author</b>	xv
<b>Acknowledgments</b>	xvii
<b>A Cautionary Tale</b>	xix
<b>Introduction</b>	xxi
<b>Shortcuts</b>	xxiii
<b>CHAPTER 1</b>	
<b>“Please Raise Your Right Hand . . .”</b>	1
<b>CHAPTER 2</b>	
<b>Why Tell the Truth?</b>	5
1. Lying Is Wrong	5
2. Lying Is a Crime	6
3. Lying Is Hard	6
4. Lying Is Confusing	7
<b>CHAPTER 3</b>	
<b>The Gaps</b>	11
<b>CHAPTER 4</b>	
<b>The Perception Gap</b>	13
Defining the Perception Gap	13
Understanding the Perception Gap	13
Bridging the Perception Gap	14

**CHAPTER 5**

<b>The Audience Gap</b>	17
Defining the Audience Gap	17
Understanding the Audience Gap	17
Bridging the Audience Gap	18

**CHAPTER 6**

<b>The Conversation Gap</b>	21
Defining the Conversation Gap	21
Understanding the Conversation Gap	21
Bridging the Conversation Gap	22

**CHAPTER 7**

<b>The Control Gap</b>	25
Defining the Control Gap	25
Understanding the Control Gap	25
Bridging the Control Gap	26

**CHAPTER 8**

<b>Preparing Ourselves</b>	27
Goals	27
Methods	28
Tools	31
Witness Notebook	31
Witness Outline	31

**CHAPTER 9**

<b>Understanding the Audience</b>	35
How to Help the Audience Understand Your Case	36
Humanize the Witness	36
Humanize the Party	38
Simplify the Language	38
Simplify the Message	38

**CHAPTER 10****Three Mistakes Witnesses Make**

- |                                      |    |
|--------------------------------------|----|
| 1. "I'll Just Tell My Story."        | 39 |
| Consider the Questioner's Advantages | 39 |
| Experience                           | 40 |
| Preparation                          | 40 |
| Documents                            | 40 |
| Other Witnesses                      | 40 |
| Script                               | 40 |
| Don't Walk in Unprepared             | 40 |
| 2. "It's Too Expensive."             | 41 |
| 3. "I Didn't Do Anything Wrong."     | 42 |

**CHAPTER 11****Seven Mistakes Lawyers Make**

- |  |    |
|--|----|
| 1. "I'm Too Busy."                     | 45 |
| 2. "The Client Is Too Busy."           | 46 |
| 3. "All Witnesses Are Created Equal."  | 47 |
| 4. "You Never Know What They'll Ask."  | 48 |
| Wear the Opponent's Hat                | 48 |
| Use What's Out There                   | 48 |
| Use Their Stuff                        | 48 |
| Use Other Lawyers                      | 49 |
| Ask Your Client                        | 49 |
| 5. Preaching, Not Teaching             | 50 |
| 6. "The Law Is the Law."               | 50 |
| 7. "Do I Need to Draw You a Road Map?" | 51 |

**CHAPTER 12****What Preparation Means**

- |                                       |    |
|---------------------------------------|----|
| Mistakes of Preparation               | 53 |
| Not Comprehensive Enough              | 53 |
| Not Tough Enough                      | 54 |
| Seven Steps for Preparing the Witness | 54 |
| 1. Start with an Introduction         | 54 |

2. Review the Facts	55
3. Review the Process	56
4. Put It Together	57
5. Anticipate Problems	58
6. Do a Dry Run	59
7. Review the Transcript	60
The When and Where of Preparation	61
<b>CHAPTER 13</b>	
<b>Basic Principles</b>	63
Basic Principle 1: Listen, Listen, Listen	63
Basic Principle 2: Don't Try Too Hard	66
<b>CHAPTER 14</b>	
<b>Rule 1: Take Your Time</b>	69
Multitasking	69
Fairness	69
1. "It's Hard to Do."	70
2. "It Will Look Bad."	71
3. "It Will Make It Take Longer."	72
<b>CHAPTER 15</b>	
<b>Rule 2: Always Remember You Are Making a Record</b>	75
Keys to Testifying Successfully	75
Be Precise	76
Be Conscious of Language	77
1. Confusing Language	78
2. Jargon	80
3. Legalese	82
4. Relative Language	83
5. Loaded Language	84
<b>CHAPTER 16</b>	
<b>Rule 3: Tell the Truth</b>	85
1. The Truth	85
"Oh, What the Heck!"	86

“Yes or No”	86
Mistakes	87
2. The Whole Truth	88
The Bad Stuff—Embrace It	88
Be Yourself	90
The Good Stuff	91
3. Nothing but the Truth	91

## CHAPTER 17

<b>Rule 4: Be Relentlessly Polite</b>	93
The Audience	93
The Challenge	94
Be Positive	94
Be Relentless	94
Keep Your Cool	94
Don’t Poke the Bear	95
Leave It to the Lawyers	95
Don’t Play Games	95
Don’t Get Spooked by Details	96
Take the Questioner’s Frustration as a Compliment	97

## CHAPTER 18

<b>Rule 5: Don’t Answer a Question You Don’t Understand!</b>	99
Three Tests for Questions	100
Clarity	100
Comprehension	101
Comfort	103
Common Types of Assumptions by Questioners	105
Category Assumptions	105
Concept Assumptions	106
Choice Assumptions	106
Wiggles and Squirms	107
1. The Court Reporter	107
2. The Follow-Up Question	108
3. The Obstinate Child	108

**CHAPTER 19**

<b>Rule 6: If You Don't Remember, Say So</b>	111
Important Points about Memory	112
What's Important for One Is Not Important for All	112
The Tougher the Issue, the Tougher It Is to Remember	
Accurately	112
Memory Fades Quickly	113
Faded Memory Becomes Random and Anecdotal	113
Anecdotal Memory Becomes Reconstructed Memory	114
"I Don't Know" versus "I Don't Recall"	115

**CHAPTER 20**

<b>Rule 7: Don't Guess</b>	119
The Danger of Guessing	119
1. Guessing about Factual Details	119
2. Guessing about Inferences	121
The Curse of the Intelligent Witness	122
The Pressure of Inference Guilt	122
3. Guessing about Hypotheticals	123
The Attack Hypothetical	123
The Meteor Hypothetical	124

**CHAPTER 21**

<b>Rule 8: Don't Volunteer</b>	125
The Witness as Artist	128
Revelations	129
Requests	129

**CHAPTER 22**

<b>Rule 9: Be Careful with Documents and Prior Statements</b>	131
Issues	131
Credibility	132
Language	133
Context	134
Protocol	134

Step 1: Ask to See It	134
Step 2: Read It	135
Step 3: Ask for the Question Again	136
Document Option Tree	137
Present Recollection Refreshed	138
Past Recollection Recorded	139
Prior Statements/Testimony	139
<b>CHAPTER 23</b>	
<b>Rule 10: Use Your Counsel</b>	143
Types of Help from Counsel	144
Privilege	144
Breaks	145
Objections	147
Errata Sheets	149
<b>CHAPTER 24</b>	
<b>Making an Impact</b>	151
<b>CHAPTER 25</b>	
<b>Adapting to the Situation</b>	155
The Interview Witness	155
The Nonprivileged Witness	156
The Vulnerable Witness	158
The English-as-a-Second-Language Witness	159
<b>CHAPTER 26</b>	
<b>The Deposition Witness</b>	161
Purposes of a Deposition	162
<b>CHAPTER 27</b>	
<b>The Grand Jury Witness</b>	165
General Purposes of the Grand Jury	165
Investigation	165
Screening	166



Fifth Amendment	167
Immunity	167
The Room	168
Counsel	168
Secrecy	169
“Target”	169
Testimony	169
The Power of Knowledge	170
Preparation	170

## CHAPTER 28

### The Trial Witness

The Trial Witness	171
Direct Examination versus Cross-Examination	172
Direct Examination	172
Cross-Examination	174
Rule 1: Take Your Time	174
Rule 2: Always Remember You Are Making a Record	175
Rule 4: Be Relentlessly Polite	175
Rule 5: Don't Answer a Question You Don't Understand!	175
Rule 7: Don't Guess	175
Rule 9: Be Careful with Documents and Prior Statements	175
Rule 10: Use Your Counsel	176

## CHAPTER 29

### The Party Witness

The Party Witness	177
Helping Your Client Find the Right Balance	178
Understanding	178
Personality	178
Emotions	178
Core Themes	179

**CHAPTER 30**

<b>The Expert Witness</b>	181
Three General Rules	181
1. “Just Do It”	182
2. Know the Territory	183
3. The Lawyer Is the Captain of the Ship	184
Checklist of Issues	185
Testimony	186
Daubert	187
Anticipating Cross-Examination	187

**CHAPTER 31**

<b>The Corporate Representative Witness</b>	189
Issues Pertaining to a Corporate Representative Witness	189
Entity	190
Notice	190
Witness	191
Knowledge	192
Preparation	192

**CHAPTER 32**

<b>The Physician as Witness</b>	195
Key Challenges Doctors Face as Witnesses	196
1. Environment	196
The Doctor Is Not in Control	196
The Other Side Will Never Agree	197
The Job Is to Sell, Not to Solve	197
2. Expertise	198
Realize That Doctors Cannot Be Their Own Experts	198
Understand the Role of Literature	199
Know the Record	199
3. Ego	200
4. Emotions	200
Be Relentlessly Polite	200

Avoid the Blame Game	201
Develop Trust	201
Be Wary of Appearance	201
Keep It Simple	201
Remember—This Is Not a Conversation	202

### **CHAPTER 33**

<b>The Criminal Defendant</b>	203
Reasons to Have a Criminal Defendant Testify	204
The Jury Wants to Hear It	205
The Defendant Wants to Say It	205
There May Be No Other Way	206

### **CHAPTER 34**

<b>The Ethics of Witness Preparation</b>	207
What Can You Do?	209
The Perjury Dilemma	210
1. Persuasion	211
2. Narrative	211
3. Withdrawal	211
4. Disclosure	211
Lawyer Conduct during a Deposition	212

### **CHAPTER 35**

<b>The Witness Bill of Rights</b>	215
1. You Have the Right to Control the Pace of Your Testimony	215
2. You Have the Right to Question the Questioner	216
3. You Have the Right to Tell Your Story	216
4. You Have the Right to Be Treated with Respect	216
5. You Have the Right to Clear and Fair Questions	216
6. You Have the Right to Forget	216
7. You Have the Right to Make Clear What You Don't Know	217
8. You Have the Right to Silence	217

- 9. You Have the Right to See and Read All Documents 217
- 10. You Have the Right to Use Your Counsel 217

**CHAPTER 36**

- Conclusion 219**

**APPENDIX A**

- Sample Witness Outline 223**

**APPENDIX B**

- Witness Preparation Summary Handout 225**

- Discussion 225
- Introductions 226
  - Deposition 226
  - Government Interview 227
  - Internal Investigation Interview 228
  - Government Agency Testimony 230
  - Grand Jury Testimony (Federal) 231
  - Grand Jury Testimony (State) 233
  - Trial 235
- Preparation Rules 237
  - 1. Take Your Time 237
  - 2. Always Remember You Are Making a Record 237
  - 3. Tell the Truth 238
  - 4. Be Relentlessly Polite 238
  - 5. Don't Answer a Question You Don't Understand! 238
  - 6. If You Don't Remember, Say So 239
  - 7. Don't Guess 239
    - Factual Details 239
    - Inferences 239
    - Hypotheticals 240
  - 8. Don't Volunteer 240
  - 9. Be Careful with Documents and Prior Statements 240
  - 10. Use Your Counsel 241

<b>Appendix C</b> <b>How Are Things in Russia?</b>	243
<b>Appendix D</b> <b>How Was Your Flight?</b>	249
<b>Appendix E</b> <b>How Are Things at the Hospital?</b>	255
<b>Index</b>	261